

unpublished cases, there seems to be a split whereby the BIA states at times that it can only exercise this certification power when it is reopening or reconsidering a case,<sup>30</sup> but in other instances states that it can consider a late appeal by certification.<sup>31</sup> As such, in the former scenario, the BIA will state that it lacks jurisdiction over untimely appeals but that it retains jurisdiction over a motion to reconsider its dismissal of an untimely appeal, including when that motion requests consideration of the reasons for untimeliness.<sup>32</sup>

Regardless, in BIA cases that do not take place before the Ninth Circuit, it appears that no late appeal or motion to reconsider a denial of an appeal has been certified solely on the basis of delivery delays. In *Matter of Liadov*, the notice of appeal was sent via overnight mail two days before the deadline and arrived one day late, but the BIA did not consider this an exceptional circumstance.<sup>33</sup> In a few unpublished cases, the BIA also denied appeals where applicants mailed the notice one or two days before the deadline.<sup>34</sup> It appears that there are only a couple of publicly available cases where the BIA certified an appeal to itself, and only one of them explicitly indicates an exceptional circumstance, where the respondent did not receive proper notice of procedures for contesting administrative closure.<sup>35</sup>

<sup>30</sup> *In re* Manuela Mata-Nevarez, AXXX XX7 183, 2011 WL 4446862, at \*1 (B.I.A. Sept. 13, 2011) (“[T]he Board retains jurisdiction over a motion to reconsider its dismissal of an untimely appeal to the extent that the motion disputes the finding of untimeliness or requests consideration of the reasons underlying the untimeliness.”); *In re* Bojan Nastastic, AXXX XX1 020, 2008 WL 4420105, at \*1 (B.I.A. Sept. 23, 2008) (stating the same). *See also* *Matter of J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997) (“Notwithstanding the statutorily mandated restrictions, the Board retains limited discretionary powers under the regulations to *reopen or reconsider* cases on our own motion.”) (emphasis added).

<sup>31</sup> *In re* Alvaro Rascon-Gonzalez, AXXX XX7 238, 2009 WL 3713212, at \*1 (B.I.A. Oct. 15, 2009) (“[T]he Board concluded that it has the authority to consider a late appeal by certification under 8 C.F.R. § 1003.1(c), under appropriate circumstances, where exceptional circumstances are present.”); *In re* Anne Nyamuiru Wangaruro a.k.a. Anne Ndirango, AXXX XX1 584, 2015 WL 10521555, at \*1 n.2 (B.I.A. Dec. 9, 2015) (similar language); *In re* John Neewaly Tarpeh, AXXX XX0 390, 2012 WL 2252996, at \*1 (B.I.A. May 21, 2012) (similar language).

<sup>32</sup> *See, e.g.,* *Manuela Mata-Nevarez*, 2011 WL 4446862, at \*1.

<sup>33</sup> *Matter of Liadov*, 23 I. & N. Dec. at 992.

<sup>34</sup> *Manuela Mata-Nevarez*, 2011 WL 4446862, at \*1; *Alvaro Rascon-Gonzalez*, 2009 WL 3713212, at \*1; *Bojan Nastastic*, 2008 WL 4420105, at \*1.

<sup>35</sup> *John Neewaly Tarpeh*, 2012 WL 2252996, at \*1 (“The respondent’s case involves exceptional circumstances. In particular, it is not clear from the record that the respondent received proper notice of the procedures to follow to contest the Immigration Judge’s decision to administratively close his proceedings.”); *see also* *Anne Nyamuiru*

Nonetheless, at least within the Ninth Circuit, case law suggests that delays caused by the postal service may very well qualify as an exceptional circumstance. The governing case law comes out of *Irigoyen-Briones v. Holder*, in which the Ninth Circuit held that the BIA does have jurisdiction to accept late filings of an appeal in light of Supreme Court precedent indicating that filing deadlines are “time prescriptions [that], however emphatic, are not properly typed jurisdictional.”<sup>36</sup> Formally, the Ninth Circuit stated that its “power was limited to correcting the jurisdictional issue” and that it would remand to the BIA to determine whether circumstances warranted actually hearing the appeal. But, at least in unpublished cases, the BIA has seemingly incorporated the Ninth Circuit’s subsequent assertion that the respondent and their attorney in the case had “acted with reasonable diligence to comply with the filing deadline.”<sup>37</sup>

In cases regarding late-filed appeals arising within the Ninth Circuit, the BIA establishes that per *Irigoyen-Briones*, the BIA may certify late appeals where there is an extraordinary circumstance. It then determines whether the respondent or their counsel acted with “reasonable diligence” in waiting to file last minute.<sup>38</sup> However, the BIA has not provided a test for “reasonable diligence” nor has it, due to a lack of details provided by respondents, had the opportunity to discuss the facts of a case to explain why reasonable diligence was lacking.<sup>39</sup>

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*Wangaruro*, 2015 WL 10521555, at \*1 n.2 (“In light of the difficulties related to obtaining a copy of the digital audio recording of proceedings and the fact that any further delay does not appear to be attributable to the respondent, we will exercise [certification] authority in this matter.”).

<sup>36</sup> *Irigoyen-Briones v. Holder*, 644 F.3d 943, 948-49 (9th Cir. 2011) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006)).

<sup>37</sup> *Id.* at 950. Note that for other deadlines, like the filing deadline for motions to reconsider, the BIA appears to have declined to follow the Ninth Circuit’s approach of permitting a process similar to equitable tolling in cases where there was late filing and the filing deadline was a nonjurisdictional claim processing rule. *Cf. Matter of Bay Area Legal Servs., Inc.*, 27 I. & N. Dec. 837, 842 (B.I.A. 2020) (“The understanding of filing deadlines as nonjurisdictional claim-processing rules is also not dispositive as to whether those deadlines are subject to extension for any reason, such as equitable tolling, because filing-deadline claim-processing rules may be enforced as mandatory.”).

<sup>38</sup> *In re Erick Guerrero-Silva*, AXXX XX4 925, 2013 WL 2610077, at \*1-2 (B.I.A. May 7, 2013); *In re Gilberto Marchan*, AXXX XX7 686, 2014 WL 3817764, at \*1 (B.I.A. June 10, 2014).

<sup>39</sup> *Erick Guerrero-Silva*, 2013 WL 2610077, at \*1-2 (“Unlike the situation in *Irigoyen-Briones*, the respondent’s counsel . . . has not provided details regarding her client’s actions or her representation following the Immigration

Within the Sixth Circuit, there appears to be no objection to the BIA's occasional refusal to exercise jurisdiction over untimely filed appeals.<sup>40</sup> The Sixth Circuit, however, does review for abuse of discretion any denials of untimely appeals over which the BIA does exercise jurisdiction.<sup>41</sup> Under Sixth Circuit case law, the BIA may in its discretion consider untimely appeals where there are "extraordinary and unique circumstances."<sup>42</sup>

The Sixth Circuit indicated no such circumstance was present in one case where the respondent mailed the notice of appeal three days in advance of the deadline by certified mail, rather than by overnight mail, and was misled by the postal service that certified mail would be adequate even though it ultimately arrived a day late.<sup>43</sup> In two other cases, the Sixth Circuit did not find an extraordinary circumstance where the delay in delivery was nearly two years, in part because the respondent and their counsel did not follow up with the mail service despite the years-long delay.<sup>44</sup>

However, the court has strongly suggested in two other cases that failure to achieve timely filing after using an overnight mail service "may well, indeed, fall within the realm of the extraordinary if not the unique."<sup>45</sup> Although in *Vasquez Salazar v. Mukasey* the Sixth Circuit ultimately remanded to the BIA to decide whether the circumstances were "extraordinary and unique" since the BIA had failed to do so initially, the court nonetheless strongly suggested that a scenario where the respondent submitted an appeal via overnight mail two days ahead of the

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Judge's decision."); *Gilberto Marchan*, 2014 WL 3817764, at \*1 ("[T]he respondent's counsel has provided no details regarding her representation or her client's actions.").

<sup>40</sup> See *Anssari-Gharachedaghy v. Immigr. & Nat'y Serv.*, 246 F.3d 512, 514 (6th Cir. 2000) ("[T]he Board's decision refusing to assert jurisdiction in this case must be upheld.").

<sup>41</sup> *Id.*; *Malak v. Gonzales*, 419 F.3d 533, 534 (6th Cir. 2005); *Vasquez Salazar v. Mukasey*, 514 F.3d 643, 645 (6th Cir. 2008).

<sup>42</sup> *Anssari-Gharachedaghy*, 419 F.3d at 515; *Vasquez Salazar*, 514 F.3d at 645.

<sup>43</sup> *Anssari-Gharachedaghy*, 419 F.3d at 515.

<sup>44</sup> *Malak*, 419 F.3d at 535; *Siby v. Gonzales*, 230 F. App'x 538, 541 (6th Cir. 2007).

<sup>45</sup> *Vasquez Salazar*, 514 F.3d at 645; *Siby*, 230 F. App'x at 541 (citing *Zhong Guang Sun v. U.S. Dep't of Just.*, 421 F.3d 105, 111 (2d Cir. 2005)).

deadline, and there was a delay in delivery by a week, could be “extraordinary and unique.”<sup>46</sup> No BIA cases arising from within the Sixth Circuit appear to cite these cases.

#### V. *Application of the law to the facts*

It seems that within the Sixth Circuit, the application here should be accepted despite arriving one day late. Even as notices of appeal lack statutory leeway for tardy filing, the Sixth Circuit has favorably viewed the approval of postal-related late filings of appeal notices, especially in *Vasquez Salazar*. The facts of *Vasquez Salazar* are highly similar to our own—here, the application was sent via overnight mail four days in advance with a delay of four days such that the application arrived a day late. In *Vasquez Salazar*, the application was sent via overnight mail two days in advance with a delay of seven days such that the application arrived 6 days late. Of course, *Vasquez Salazar* involves a thirty-day filing deadline that necessarily implicates a tighter timeline for preparation and mailing of a notice of appeal than a one-year deadline for an asylum application. But our relatively favorable facts in addition to a statute that contemplates exceptions to the rule indicates that a similarly-situated asylum application should be accepted.

However, the asylum applicant likely would reap greater benefits by bringing their case in the Ninth Circuit rather than the Sixth Circuit, for two reasons. First, one may petition for review of a filing deadline question in the Ninth but not the Sixth Circuit because the former considers issues of late filing to be “questions of law” within the court’s jurisdiction while the latter does not. Second, while the BIA has interpreted the Ninth Circuit case *Irigoyen-Briones* to make it more difficult to obtain an exception to late filing, at least for notices of appeal, other favorable Ninth Circuit case law is especially understanding of the stressors faced by immigration practitioners. The Sixth Circuit lacks this favorable case law.

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<sup>46</sup> *Vasquez Salazar*, 514 F.3d at 644.

Indeed, the Ninth Circuit seems generally sensitive to the realities of practicing immigration law, having noted in *Irigoyen-Briones* that the asylum applicant “owns the thirty days [for filing notices of appeal], and all of them are likely to be essential.”<sup>47</sup> The Court further indicated that an attorney waiting until all evidence has been collected before mailing an asylum appeal acts ethically. Such a sentiment should extend to the filing of asylum applications, since the difficulty of finding an immigration lawyer and the sheer complexity of asylum applications indicate that a one-year deadline is arguably as stringent a turnaround as filing a much less intensive notice of appeal within thirty days. In such a scenario, and assuming that the immigration lawyer here had no other option than to mail the application when they did, submitting four days before the deadline is arguably “reasonably diligent” and a subsequent postal delay of four days is “extraordinary.” The Sixth Circuit lacks this last awareness of on-the-ground realities, and thus may be more prone to distinguishing the jurisprudence on late-filed appeal notices than the Ninth Circuit would be.

## VI. Conclusion

While an immigration court’s treatment of a late-filed asylum application is unlikely to vary greatly between the Sixth and Ninth Circuits, the applicant should nonetheless reconsider the possibility of moving residences to somewhere in the Sixth Circuit. Both Circuits have not squarely dealt with the question of postal delays for asylum applications yet have seemed generally forgiving in the case of tardy appeal notices. However, only the Ninth Circuit exercises jurisdiction over late filing-related issues in asylum applications and has explicitly acknowledged the particular stressors faced by immigration practitioners from smaller entities like nonprofits.

<sup>47</sup> *Irigoyen-Briones v. Holder*, 644 F.3d 943, 950 (9th Cir. 2011). The court further notes, “[Applicants’] appeals are not, by and large, handled by giant spare-no-expense law firms, in which a partner can command a senior associate who can command a junior associate to have something on his desk by 9:00 A.M. Monday without fail, and then fly a courier to Washington D.C. to assure timely filing in Falls Church.” *Id.*

As such, if it became necessary in this case to petition a circuit court for review, a favorable outcome is more likely in the Ninth rather than the Sixth Circuit.

**Applicant Details**

First Name **Elizabeth (Betsy)**  
Last Name **Sheppard**  
Citizenship Status **U. S. Citizen**  
Email Address [eshep@umich.edu](mailto:eshep@umich.edu)  
Address

**Address****Street****3009 Park Ave****City****Lafayette Hill****State/Territory****Pennsylvania****Zip****19444****Country****United States**

Contact Phone Number **4842136701**

**Applicant Education**

BA/BS From **George Washington University**  
Date of BA/BS **May 2020**  
JD/LLB From **The University of Michigan Law School**  
[http://www.law.umich.edu/  
currentstudents/careerservices](http://www.law.umich.edu/currentstudents/careerservices)  
Date of JD/LLB **May 5, 2024**  
Class Rank **School does not rank**  
Law Review/Journal **Yes**  
Journal(s) **University of Michigan Journal of Law  
Reform**  
Moot Court Experience **Yes**  
Moot Court Name(s) **Michigan Law Oral Advocacy Competition  
Henry M. Campbell Moot Court  
Competition**

**Bar Admission**

### **Prior Judicial Experience**

Judicial Internships/ Externships	<b>No</b>
Post-graduate Judicial Law Clerk	<b>No</b>

### **Specialized Work Experience**

#### **Recommenders**

Edmonds, Mira  
edmondm@umich.edu

Mortenson, Julian  
jdmorten@umich.edu  
734-763-5695

Walker, Christopher  
chris.j.walker@umich.edu  
\_734\_ 763-3812

Becker, Ted  
tbecker@umich.edu  
734-763-6025

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third year law student at the University of Michigan originally from Lafayette, Hill Pennsylvania, and I am writing to apply for a clerkship position in your chambers for the 2024 term.

This summer, I will be working for a Philadelphia-based law firm, and plan to return to the Philadelphia area after graduation from law school, as my family still resides in the area. I am particularly excited about the opportunity to clerk for a judge in my own community and serve as a member of my community's legal process.

I am passionate about building a career in litigation, a passion which grew throughout my experience in law school. As a history major, I have always enjoyed research and writing, but during my first-year legal practice course, I gained exposure to new types of research and writing that further developed this interest. I especially enjoyed presenting my research through written briefs and oral advocacy simulations. This led me to participate in the Michigan First-Year Oral Advocacy Competition and to compete in Michigan's flagship moot court competition, in which I advanced to the quarterfinal round. In addition to these mock appellate experiences, I joined the Michigan Law mock trial team to gain exposure to the trial process.

My interest in litigation, however, extends beyond oral advocacy. In addition to my oral advocacy experience, I have completed substantive research and writing, such as for a student note. Through my work with the Michigan Journal of Law Reform, where I now serve as the managing production editor, I produced a note exploring qualified immunity for educators in the context of § 1983 suits. I have also completed research and writing through my practical lawyering experiences. During my first-year summer, I worked for a small policy organization focused on reforming the criminal justice system. In this role, I conducted substantial case law research on issues affecting criminal law and criminal-adjacent topics, and I also analyzed pending Congressional legislation to determine its potential applicability to criminal justice reform efforts. Next, during my second year of law school, I directly represented clients through my university's Civil-Criminal Litigation Clinic, including in landlord-tenant, commutation, and private tort cases. This real-life litigation experience increased my interest in the judicial process generally and confirmed my passion for litigation.

I have attached the requested materials for your consideration. Letters of recommendation from the following individuals will follow under separate cover:

- Professor Ted Becker: tbecker@umich.edu, (734)-763-6025
- Professor Mira Edmonds: medmond@umich.edu, (734)-647-1964
- Professor Julian Mortenson: jdmorten@umich.edu, (734)-763-5695
- Professor Christopher Walker: chris.j.walker@umich.edu, (734)- 763-3812

Thank you for your time and consideration.

Sincerely,

Elizabeth Sheppard

## Elizabeth (Betsy) Sheppard

3009 Park Avenue, Lafayette Hill, PA 19444

(484)-213-6701 • eshep@umich.edu

She/Her/Hers

### EDUCATION

#### THE UNIVERSITY OF MICHIGAN LAW SCHOOL

*Juris Doctor*

Ann Arbor, MI  
Expected May 2024

Journals: *University of Michigan Journal of Law Reform*, Managing Production Editor Vol. 57  
Honors: Quarterfinalist, Henry M. Campbell Moot Court Competition, 2022-2023  
Honors in Legal Practice  
Activities: Women Law Student Association, Programming Chair  
Mock Trial Team  
Civil Rights Litigation Clearinghouse, Contributor, Fall 2020 – Winter 2023  
Oral Advocacy Competition, 2022

#### THE GEORGE WASHINGTON UNIVERSITY

*Bachelor of Arts* in history with a minor in French, *magna cum laude*

Washington, DC  
May 2020

Honors: Gardner G. Hubbard Memorial Prize for Excellence in U.S. History, Special Honors in History  
Activities: Undergraduate Law Review, 2019-2020  
Phi Alpha Theta, History Honors Society  
Phi Alpha Delta, Pre-Law Fraternity

### EXPERIENCE

#### DUANE MORRIS

*Summer Associate*

Philadelphia, PA  
Summer 2023

#### CLAUSE 40 FOUNDATION

*Legal Intern*

Washington, DC  
May 2022 – August 2022

- Conducted non-profit law and procedural due process research for a 501(c)(3) committed to ensuring due process rights for all.
- Compiled updates on Congressional legislation and sentencing data for lobbying efforts.

#### COLONIAL MIDDLE SCHOOL

*Long-term French Substitute*

Plymouth Meeting, PA  
January 2021 – June 2021

- Organized and executed lesson plans for 11 French classes with 240 in-person, hybrid, and remote learners.
- Supported students through classwork, individual guidance, and softball coaching.

#### ABINGTON FRIENDS SCHOOL

*Assistant Teacher*

Jenkintown, PA  
September 2020 – January 2021

- Served as in-person teacher for introductory and intermediate language classes alongside co-teachers instructing via Zoom.

#### THE CRAB HOUSE AT TWO MILE LANDING

*Food Runner*

Wildwood Crest, NJ  
July 2020 – August 2020

- Engaged with restaurant clientele at a large, fast-paced restaurant, promoting enjoyable experiences.

#### YMCA CAMP TOCKWOUGH

*Athletic Director*

Worton, MD  
Summers 2018 & 2019

- Managed a team of 10 athletic staff members who led daily sports activities for over 400 campers per day.
- Developed curriculum and safety protocols for the athletics program, including the implementation of a target sports program.

### ADDITIONAL

**Languages:** French (working proficiency), Spanish (elementary)

**Interests:** Watching French TV shows, making homemade pasta, and watching the Philadelphia Phillies

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# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Sheppard, Elizabeth A  
Student#: 60014784



*Paul Robinson*  
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Credit Hours	Grade
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### Fall 2021 (August 30, 2021 To December 17, 2021)

LAW	510	004	Civil Procedure	Maureen Carroll	4.00	4.00	4.00	4.00	B+
LAW	520	003	Contracts	Albert Choi	4.00	4.00	4.00	4.00	A-
LAW	540	002	Introduction to Constitutional Law	Julian Davis Mortenson	4.00	4.00	4.00	4.00	A-
LAW	593	016	Legal Practice Skills I	Ted Becker	2.00		2.00		H
LAW	598	016	Legal Pract: Writing & Analysis	Ted Becker	1.00		1.00		H

**Term Total** GPA: 3.566 15.00 12.00 15.00

**Cumulative Total** GPA: 3.566 12.00 15.00

### Winter 2022 (January 12, 2022 To May 05, 2022)

LAW	530	002	Criminal Law	Luis CdeBaca	4.00	4.00	4.00	4.00	A-
LAW	580	001	Torts	Kyle Logue	4.00	4.00	4.00	4.00	B
LAW	594	016	Legal Practice Skills II	Ted Becker	2.00		2.00		H
LAW	724	001	International Refugee Law	Betsy Fisher	3.00	3.00	3.00	3.00	A-
LAW	992	306	Research: Special Projects	Margo Schlanger	2.00	2.00	2.00	2.00	A

**Term Total** GPA: 3.530 15.00 13.00 15.00

**Cumulative Total** GPA: 3.548 25.00 30.00

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# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Sheppard, Elizabeth A  
Student#: 60014784



*Paul Robinson*  
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Grade
<b>Fall 2022 (August 29, 2022 To December 16, 2022)</b>								
LAW	669	002	Evidence	David Moran	3.00	3.00	3.00	B+
LAW	771	001	Progres Prosecution: Law&Pol'y	Eli Savit	2.00	2.00	2.00	A
				Victoria Burton-Harris				
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00	2.00		S
LAW	885	007	Mini-Seminar	Susan Page	1.00			Y
			The Enduring Allure of Book Bans					
LAW	920	001	Civil-Criminal Litigation Clns	Mira Edmonds	4.00	4.00	4.00	A-
				Victoria Clark				
LAW	921	001	Civil-Criminal Litig Clns Sem	Mira Edmonds	3.00	3.00	3.00	A
				Victoria Clark				
<b>Term Total</b>				<b>GPA: 3.725</b>	<b>15.00</b>	<b>12.00</b>	<b>14.00</b>	
<b>Cumulative Total</b>				<b>GPA: 3.605</b>		<b>37.00</b>	<b>44.00</b>	
<b>Winter 2023 (January 11, 2023 To May 04, 2023)</b>								
LAW	428	001	Evidence Practicum	Daniel Hurley	2.00	2.00	2.00	A
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00	4.00	4.00	B+
LAW	674	001	Rules of Play:Sports Legal Sys	Richard Friedman	2.00	2.00	2.00	B+
LAW	677	001	Federal Courts	Chris Walker	3.00	3.00	3.00	A-
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00	2.00	2.00	S
LAW	865	001	Law of American Federalism	Gil Seinfeld	2.00	2.00	2.00	A
LAW	886	007	Mini-Seminar II	Susan Page	0.00	0.00		S
			The Enduring Allure of Book Bans					
<b>Term Total</b>				<b>GPA: 3.607</b>	<b>15.00</b>	<b>13.00</b>	<b>15.00</b>	
<b>Cumulative Total</b>				<b>GPA: 3.606</b>		<b>50.00</b>	<b>59.00</b>	

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# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Sheppard, Elizabeth A  
Student#: 60014784



*Paul Robinson*  
University Registrar

Course		Section	Load		Graded	Towards	Credit
Subject	Number	Number	Course Title	Instructor	Hours	Hours	Program Grade
<b>Fall 2023 (August 28, 2023 To December 15, 2023)</b>							
Elections as of: 05/30/2023							
LAW	641	001	Crim Just: Invest&Police Prac	Ekow Yankah	4.00		
LAW	681	001	First Amendment	Don Herzog	4.00		
LAW	780	001	Human Rights: Themes and Var	Steven Ratner	3.00		
LAW	893	001	Presidential Powers	Chad Readler	2.00		

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Total Number of Pages 3

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## University of Michigan Law School Grading System

### Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

#### Other Grades:

- F Fail.
- H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.
- I Incomplete.
- P Pass when student has elected the limited grade option.\*
- PS Pass.
- S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.\* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)
- T Mandatory pass when student is transferring to U of M Law School.
- W Withdrew from course.
- Y Final grade has not been assigned.
- \* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

### Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

### Official Copies

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records  
University of Michigan Law School  
625 South State Street  
Ann Arbor, Michigan 48109-1215  
(734) 763-6499

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with great enthusiasm that I write this recommendation for Elizabeth ("Betsy") Sheppard. Betsy was my student during the Fall 2022 semester in the Civil-Criminal Litigation Clinic ("CCLC") at Michigan Law. The CCLC is a general litigation clinic in which law students work in teams of two on a variety of civil and criminal legal matters. I supervised Betsy's case work and taught her in the seminar component of the clinic. She performed with excellence in all aspects of the course. Betsy is smart and highly competent, while also being refreshingly straight forward and unpretentious. I have no doubt that she would be an excellent judicial clerk.

I supervised Betsy and her partner on an eviction matter and a sentence commutation case. In both cases, Betsy did top notch work. From early in the semester, I had the utmost confidence that Betsy was on top of all developments in her case work and that nothing would fall between the cracks. In the eviction matter, I was able to observe Betsy's oral advocacy in court and in negotiations with opposing counsel. She projected more confidence than she perhaps felt, such that it would have been hard for anyone to tell that this was her first court appearance and her first real-world negotiation. The case took far longer to resolve than it should have, due almost entirely to foot-dragging by the other side. Betsy did a great job pushing and prodding when necessary to keep things moving along, while never losing her cool despite a great many frustrations. She also engaged in effective client counseling, appropriately expressing empathy for her client's situation and advising her about her options.

I was also impressed with Betsy's written advocacy in the commutation case. She and her partner put together an elegantly written and compelling commutation application on behalf of their client. They showed their client great compassion despite his past offenses, and were able to build on that to write an effective narrative on his behalf. The first draft of the petition was already impressive, and it got better from there because of Betsy's ability to incorporate feedback effectively. Betsy worked well with her clinic partner, despite significant personality differences, showing appreciation for her partner's strengths and patience for his quirks.

Betsy was also a very active participant in the clinic seminar. She was always willing to contribute to class discussion but never dominated. Her comments were thoughtful and consistently enriched the conversation. Betsy performed strongly in the mock trial that is the capstone experience of the clinic seminar. It was clear that she prepared carefully and put a lot of thought into her trial strategy. As throughout the semester, she took feedback on her trial performance without a hint of defensiveness, which is not such an easy thing to do in that setting.

In sum, I have no hesitations in recommending Betsy for a position as your clerk, and I urge you to give serious consideration to her application.

Sincerely,

Mira Edmonds  
Clinical Assistant Professor of Law

Mira Edmonds - edmondm@umich.edu

MICHIGAN LAW  
UNIVERSITY OF MICHIGAN  
701 South State Street  
Ann Arbor, MI 48109-3091

JULIAN DAVIS MORTENSON  
James G. Phillipp Professor of Law

June 12, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of my student Betsy Sheppard's application for a clerkship in your chambers. Betsy is a smart, dedicated, and engaging law student who has a natural talent for getting along with people. She'd be a great clerk, not only as a substantive contributor to the legal work of the chambers, but also as a thoughtful, constructive, and positive colleague.

I first got to know Betsy as a student in a 45-person section of constitutional law during her first semester on campus. Because the section was so small, I got to know the students especially well, and Betsy certainly stood out as someone who was a pleasure to get to know as a student and as a future lawyer. She was a bold and highly constructive participant in classroom conversation, always willing to participate and to take a risk on being wrong as part of the process towards getting to an understanding. I really admired that about her approach, especially since so many law students can be reluctant to explore ideas at first without being confident they completely understand the problem or are certain about the answer. Her willingness to engage in the process of working through hard ideas even in the face of uncertainty makes for a highly collaborative approach to classroom learning; it's really distinctive.

As an intellectual matter, Betsy has a highly pragmatic streak that's exceptionally useful in classroom discussion (not to mention in the work of lawyering), and that often characterized her interventions and our exchanges over the course of the semester. She'd raise her hand about some doctrinal distinction, meticulously and accurately summarize the substance of the point at issue, and then ask a version of the question: "why does this make a difference to people on the ground?" Sometimes it would be in reference to the way the same physical fact can present differently depending on what (invisible and only inferentially demonstrated) mental state you attribute to the actors in the legal problem. Other times it would be about the way that some event can easily be reframed to fit on one side or the other of a given legal test (her discussion of the *Stafford Rate Cases* from the commerce clause stands out in my memory in this regard). These questions were always posed with a precision that evidenced full familiarity with the black letter formulations—certainly it's not that she didn't take the doctrine seriously. It's that she took the first step (of understanding the doctrine), but then also was persistently interested in the second step: "do these formal differences make sense in a way that matters to something real?" It was great stuff from a first semester 1L.

Betsy's writing is very good and thoroughly reflects her strong analytical grasp of the legal materials she works with. Certainly her email communication with me has always been crisply expressed and substantively on point. And her Con Law exam was similarly well written, with nice execution of communicative structure at both the sentence and paragraph levels. Her unpretentious, focused style serves her as well in written communication as it does in personal discussion.

After law school and after clerking, Betsy plans to go into litigation. She's especially interested in trial work; her work in Michigan's Civil-Criminal Litigation Clinic whetted her appetite for on the ground work at the stage of developing cases, building records, and laying legal foundations—she finds the wide range of open-ended strategic thinking especially appealing. Her smarts, her level head, and her doctrinally-informed pragmatism will serve her well as a litigator in the long run in much the same way as they will help her be an effective law clerk in whatever chambers she ends up in.

Long story short, Betsy is terrific. Please don't hesitate to reach out to me if you have any questions; I'd be pleased to speak with you further on her behalf.

Best regards,

Julian Davis Mortenson

Julian Mortenson - [jdmorten@umich.edu](mailto:jdmorten@umich.edu) - 734-763-5695

**UNIVERSITY OF MICHIGAN LAW SCHOOL  
625 South State Street  
Ann Arbor, Michigan 48109**

June 12, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Betsy Sheppard for a clerkship in your chambers. Betsy was in my Federal Courts class this last semester, and she was a standout both in class and on the final examination. I am excited about her future in the legal profession and am confident she has the intellectual firepower and legal analysis and writing skills to excel as a law clerk after graduation.

It was a joy to have Betsy in class this last semester. From the outset, it was clear from her in-class participation and discussions in office hours that she was engaging critically and carefully with the course material. Her questions and comments demonstrated a deep understanding of the course material. As part of the course, Betsy and a fellow classmate did a terrific five-minute recap presentation on the constitutionalization of state law claims under Section 1983. This was one of the more difficult topics in the class, and Betsy did a fantastic job of distilling these complex issues for the rest of the class—both orally and with the use of PowerPoint visuals. This skill will obviously serve her well as a lawyer and a law clerk.

Once the final exam grades were unblinded, I was not at all surprised to see that she received one of the higher grades in the class. To prepare this letter, I reviewed her exam, and it did an excellent job spotting all of the major issues and articulating and applying the relevant legal rules. Her policy essay was also the best in class, nicely weaving together law and policy to recommend legislative action on qualified immunity. I should underscore that Federal Courts here at Michigan Law typically attracts some of the smartest and hardest-working students at the law school, and this class was no exception. We have a mandatory curve, and an A- is among the top third of the class. To put that in perspective, I know of at least four very sharp students who received a lower grade than Betsy who have already secured federal clerkships, including two on the federal courts of appeals. I would expect another dozen or more students with a lower grade on the final exam than Betsy's to secure clerkships in the near future.

Finally, I should underscore how wonderful it was to have Betsy in class. She exudes professionalism—a hard worker and careful listener who seems very receptive to constructive feedback. She strikes me as highly organized with careful attention to detail. But she is also a lot of fun, with a great sense of humor. She's the type of person who interpersonally would add a lot of value to a litigation team or judicial chamber. I am so excited to see the impact she will have on the legal profession in the years to come, and clerking in your chambers would obviously only expand her horizons.

I hope that you take a serious look at Betsy's application and that you will decide to interview her. If I can add anything else, please do not hesitate to contact me (734-763-3812; [chris.j.walker@umich.edu](mailto:chris.j.walker@umich.edu)).

Sincerely,

Christopher J. Walker  
Professor of Law

Christopher Walker - [chris.j.walker@umich.edu](mailto:chris.j.walker@umich.edu) - 734\_763-3812

**UNIVERSITY OF MICHIGAN LAW**  
**Legal Practice Program**  
801 Monroe Street, 945 Legal Research  
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Ted Becker  
Director Legal Practice Program  
Clinical Professor of Law  
tbecker@umich.edu  
(734) 763-6025

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Elizabeth ("Betsy") Sheppard's application for a clerkship in your chambers. I know her well, and think so highly of her abilities that I have asked her to be one of my student assistants next year. Based on my knowledge of her academic abilities and work ethic, I am extremely pleased to recommend her. Betsy was a very capable student in my class, and I have absolutely no reservations about recommending her for a clerkship.

First, as to Betsy's legal abilities, I had the pleasure of working with her in the 2021-22 academic year in my Legal Practice course (as well as an ungraded "1L mini-seminar" in the winter semester called "Abraham Lincoln and Legal Ethics"). Legal Practice is a full-year course that introduces first-year law students to numerous experiential skills, such as common types of research and writing assignments that they will likely be asked to produce as practicing attorneys. The first semester emphasizes objective analysis of simulated client problems, as well as communicating that analysis to a senior attorney in a way that a legal audience would likely expect. The second semester switches focus to advocacy and other lawyering skills. Students meet individually with me on numerous occasions to discuss my comments on the drafts of their written assignments and how they might revise them so that they correspond with what a legal reader will likely expect.

Betsy was a genuine pleasure to have in class and to talk with outside of class, and her work was top notch. She received Honors in the course at the end of the year (limited to the top 20%). As that result might suggest, she consistently received high marks on all assignments, such as tying for the second-highest grade on the rewrite of her closed memo (the first major writing assignment of the first semester) and her pretrial and summary judgment briefs (the two major writing assignments in the second semester). Her legal research was thorough and effective, and she smoothly made the shift from objective analysis to advocacy. In short, Betsy consistently exceeded my expectations and her writing, analytical, research, and other skills were definitely above the norm for a first-year law student at that point in her legal career.

I met with Betsy individually on numerous occasions during office hours and as part of the mandatory conference process for various assignments. As mentioned above, I much enjoyed these discussions: she was professional, she took the assignments seriously and wanted to increase her proficiency as a legal writer because she knew how important that would be in her career, and she put in the effort to make that happen. I didn't have to tell her things twice; she recognized without prompting when comments or suggestions I might have made on an earlier assignment remained applicable for later projects (this is something that many 1Ls in my experience have difficulty mastering). In sum, she brought a "real world" approach to my course, and that showed in the quality of her work product.

I was so impressed with Betsy's performance in my course that, in my capacity as Director of the Legal Practice Program, I asked her to be one of the "senior judge" student assistants for a newly hired professor during the current academic year who did not have previous students of his own to tap as assistants. Among other things, upper-level student assistants in Legal Practice review student papers, hold office hours, and serve as mentors for 1Ls, so a strong work ethic and winning personality are a must. As I expected, Betsy did an exemplary job for the other professor, and I am pleased that she then accepted my offer to serve as one of my assistants in the upcoming year. As part of her duties, she will be preparing a writing assignment for my class use in a following year. This will require her to create the facts of the problem, conduct the research necessary to find all relevant cases, refine the problem as necessary in light of what the research shows, and then prepare the assignment materials. I look forward to working with her next year on this project.

In summary, based on Betsy's demonstrated level of performance in my course, I have no doubt that she has what it takes to make an excellent judicial clerk. I believe that her analytical and writing abilities will make her a valuable resource for you. The abilities and work ethic she's demonstrated in my class and as a student assistant for the Legal Practice Program leave me no doubt that she will succeed.

I would be happy to discuss Betsy's qualifications and background in more detail. Please do not hesitate to contact me at the above-listed phone number or email address.

Ted Becker - tbecker@umich.edu - 734-763-6025

Sincerely,

/Ted Becker/

Edward R. "Ted" Becker  
Director Legal Practice Program  
Clinical Professor of Law

Ted Becker - tbecker@umich.edu - 734-763-6025

**Elizabeth (Betsy) Sheppard**

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(484)-213-6701 • eshep@umich.edu  
She/Her/Hers

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**WRITING SAMPLE**

I wrote this brief for the University of Michigan Law School's flagship moot court competition, which involved a fictional case, *Sutherland Bank v. Consumer Financial Protection Bureau*. This case raised two main questions. The first concerned the right to a jury trial in administrative proceedings, and the second concerned presidential removal power over executive officers. This brief is a writing sample of my own work, and it has not been edited by others.

Elizabeth (Betsy) Sheppard  
Writing Sample

## STATEMENT OF THE CASE

### A. Introduction

Petitioner H.B. Sutherland Bank, N.A. (the Bank) brings this appeal from the Twelfth Circuit and raises two arguments. *H.B. Sutherland Bank, N.A. v. Consumer Fin. Prot. Bureau*, 505 F.4th 1, 1 (12th Cir. 2022) (en banc), *cert. granted*, No.22-0096. First, the Bank alleges that its Seventh Amendment rights were violated when an administrative law judge at the Consumer Financial Protection Bureau entered judgement against the Bank for engaging in deceptive practices in violation of the Consumer Financial Protection Act. *Id.* at 2; 12 U.S.C. §§ 5531, 5536. Next, the Bank alleges that the removal protections for administrative law judges within the Consumer Financial Protection Bureau violate the separation of powers. *Sutherland Bank*, 505 F.4th at 2. Both of these arguments lack merit.

### B. Statement of Facts

Following the 2008 financial crisis, approximately four million American families lost their homes to foreclosure. Fin. Crisis Inquiry Comm’n, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, xvxxvi–vii (2010), <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [hereinafter Fin. Crisis Inquiry Comm’n Final Report]. Another four million fell behind on rent and mortgage payments. *Id.* Congress, recognizing that “[t]he collateral damage of this crisis ha[d] been real people and real communities[,]” *id.*, passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (2010). Through this act, Congress created the Consumer Financial Protection Bureau (the Bureau), entrusting it with the enforcement of eighteen preexisting federal consumer protection statutes and empowering it to enforce an added prohibition on unfair, deceptive, or abusive acts and practices (UDAAPs) in the consumer finance sector. *Id.*; 12 U.S.C. §§ 5531, 5536.

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Sutherland Bank, which operates in this sector, takes issue with this enforcement power. *Sutherland Bank*, 505 F.4th at 2. The Bank and its subsidiaries provide retail banking, stock brokerage, insurance, and wealth management services to over eleven million customers throughout the country. *Id.* at 2–3. While providing these services, the Bank committed a plethora of consumer protection violations for which the bureau brought an enforcement action. *Id.* An administrative law judge (ALJ) heard the case, and made the following legal and factual findings. The specific facts underlying the violations are not in dispute. *Id.* at 6.

First, the Bank enrolled customers in its Account Protection Program (APP) overdraft-protection service without their consent, for which the bank charged overdraft fees in violation of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r. *Sutherland Bank*, 505 F.4th at 6. Additionally, the Bank failed to establish and implement reasonable written policies and procedures concerning the accuracy and integrity of information that the Bank furnished to nationwide consumer reporting services, which violated the Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x. *Sutherland Bank*, 505 F.4th at 6.

Lastly, the Bank engaged in deceptive acts and practices both in-person and over the phone in violation of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531(a), (d)(1), 5536 (a)(1)(B). The Bank made false statements and misrepresentations to its customers. *Sutherland Bank*, 505 F.4th at 6. Specifically, the Bank told customers that they were not being assessed fees on their accounts, even though the accounts were automatically enrolled in the APP service, which assesses fees. *Id.* at 5. The Bank also advertised accounts to potential buyers as having no mandatory fees, despite the automatic enrollment in the APP service. *Id.* The Bank now asserts a separation of power claim and a Seventh Amendment challenge, but it asserts the Seventh Amendment only in regards to the CFPA. It concedes that both the Fair Credit Reporting Act and

**Elizabeth (Betsy) Sheppard**  
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the Electronic Fund Transfer Act constitute congressionally-created public rights for which no jury right exists. *Id.* at 4, 6.

### **C. Procedural History**

The Bureau initiated administrative proceedings against the Bank on July 6, 2019 for the above-listed consumer protection violations. *Id.* at 4. The parties proceeded to oral argument, and in early 2020, an administrative law judge (ALJ) at the Bureau issued a recommended decision against the Bank on all claims. *Id.* The Bureau’s director affirmed. *Id.* at 4-5. This decision held the Bank liable for economic damages caused to consumers (\$350,526.31 for the CFPA violation, \$6,450,332.12 for the EFTA violation, and \$1,339,036.15 for the FCRA violation), as well as for civil penalties in the amount of \$4,155,500 for the CFPA violation. *Id.* Additionally, it enjoined the Bank from offering the APP services to consumers. *Id.* at 5. The Bank appealed, and a Twelfth Circuit panel affirmed the Bureau’s findings. *Id.* The Bank appealed again, and the Twelfth Circuit, en banc, again rejected the Bank’s arguments. The Bank then petitioned this Court for Certiorari. *Id.* Respondent Consumer Financial Protection Bureau urges this Court to affirm the findings of each of the lower courts.

## **DISCUSSION**

### **I. The Consumer Financial Protection Bureau’s use of an administrative judge does not violate the Seventh Amendment.**

The Bureau did not violate the Bank’s Seventh Amendment right by using an administrative law judge to assess fines against the Bank for engaging in unfair, deceptive, or abusive acts or practices (UDAAPs). The Seventh Amendment states that “In Suits at common law . . . the right of trial by jury shall be preserved[.]” U.S. Const. amend. VII. This right applies only to claims that arose in courts of law, rather than courts of equity, at the time of ratification. *Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 449 (1977).

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However, it does not attach to all claims that traditionally fell within courts of law. *See, e.g., Granfinanciera v. Nordberg*, 492 U.S. 33, 52–53 (1989). A public rights exception permits adjudication of some common law claims without a jury, namely those claims that concern a public right. *See, e.g., id.* The CFPA’s prohibition on UDAAPs is neither a common law claim nor analogous to one. Nevertheless, even if such an analogy existed, the public rights exception applies.

**A. The UDAAP ban is not a traditional common law claims nor analogous to one.**

The CFPA’s prohibition on UDAAPs is neither a common law claim nor a common law analogy, thus removing it from the ambit of the Seventh Amendment. *See, e.g., Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). The Seventh Amendment only applies where the type of claim at issue is a traditional common law claim—one that was tried in a court of law at the time of the founding—or where the claim at issue is analogous to such a traditional claim. *Id.*

The prohibition on UDAAPs is not a traditional common law claim. Traditional claims include trespass, trover, detinue and replevin, ejectment, covenant, debt, general assumpsit and fraud. 8 James Wm. Moore et al., *Moore’s Federal Practice* § 38.110, LexisNexis (database updated 2022). Therefore, the Seventh Amendment’s applicability to the CFPA claim at issue depends on the existence of a common law analogy. *See Markman*, 517 U.S. at 376.

However, none exists. In determining “whether a statutory action is more analogous to cases tried in courts of law than in courts of equity or admiralty, [the Court] examine[s] both the nature of the statutory action and the remedy sought.” *Feltner v. Columbia Pictures*, 523 U.S. 340, 348 (1998). The common law claim most similar to the UDAAP ban is fraud, but the two are not analogous. *See Sutherland Bank*, 505 F.4th at 14. Therefore, the Seventh Amendment does not apply.

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**1. Common law fraud’s intent requirement distinguishes it from the UDAAP ban.**

The lack of an intent requirement differentiates common law fraud from this CFPA claim. While an analogy need not be identical, *Tull v. United States*, 481 U.S. 412, 421 (1987), mere similarity does not suffice. *Sutherland Bank*, 505 F.4th at 14.

Unlike fraud, the UDAAP ban encapsulates non-intentional action. 12 U.S.C. § 5531(c), (d). The CFPA specifically defines unfairness and abusiveness to require no showing of intent. 12 U.S.C. § 5531(c), (d). Likewise, deception requires no intent. Consumer Prot. Bureau, CFPB Consumer Laws and Regulations: UDAAP 7 (2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_unfair-deceptive-abusive-actspractices-udaaps\\_procedures.pdf](https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-actspractices-udaaps_procedures.pdf) (“intent to deceive is not necessary for deception to exist.”). In stark contrast, fraud is “the *intentional* misrepresentation of a material fact made *for the purpose* of inducing another to rely, and on which the other reasonably relies to his or her detriment.” 37 Am. Jur. 2d *Fraud and Deceit* § 1, Westlaw (database updated August 2022) (emphasis added). This distinction undermines the existence of a common law analogy.

Furthermore, the canon of constitutional avoidance requires differentiating “deceptive acts and practices” from common law fraud. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018) (citing *Crowell v. Benson*, 285 U.S. 22, 62, (1932) (“When ‘a serious doubt’ is raised about the constitutionality of an act of Congress, ‘it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’”). Here, when the UDAAPs provision is read distinctly from common law fraud, the Seventh Amendment question dissipates. *See Jennings*, 138 S.Ct. at 842; *see Markman*, 517 U.S. at 376.

**2. The available relief for UDAAP violations further distinguishes deception from common law fraud.**

In addition to the substantive differences between common law fraud and deception, the

**Elizabeth (Betsy) Sheppard**

## Writing Sample

relief authorized by the CFPA further distinguishes these claims. The CFPA authorizes numerous remedies, including rescission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement or compensation for unjust enrichment, payment of damages or other monetary relief, public notification about the violation including cost, limits on activities, and civil monetary penalties. 12 U.S.C. § 5565(a)(2). These remedies are primarily equitable relief, including clearly equitable relief such as rescission or reformation of contracts, restitution, disgorgement, public notification, and limits on activities and functions. 12 U.S.C. § 5565(a)(2); *see CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011).

Traditionally, suits for damages or debts fell in courts of law, while suits seeking specific relief fell in courts of equity. *Plechner v. Widener Coll., Inc.*, 569 F.2d 1250, 1258 (3d Cir. 1977) (citing 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2311). While the CFPA authorizes payment of damages or other monetary relief and civil money penalties, 12 U.S.C. § 5565(a)(2), the fact that relief takes the form of a money payment does not automatically remove it from the category of traditionally equitable relief. *CIGNA Corp.*, 563 U.S. at 441. Equity courts provided relief in the form of “monetary ‘compensation’ for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment.” *Id.* at 441–42. Courts of law, in contrast, provided “nothing other than compensatory damages[.]” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993).

The nature of relief sought therefore turns on whether the Bureau sought any relief other than compensatory damages. *See id.* It did. The Bureau sought injunctive relief, civil penalties, and economic damages for harm caused to consumers by the Bank. *Sutherland Bank*, 505 F.4th at 4–5. This collection of relief demonstrates that the Bureau sought more than just compensatory damages. *See Mertens*, 508 U.S. at 255.

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Furthermore, the civil penalties assessed by the Bureau extend beyond mere compensatory damages. “[O]ne of the most basic interpretive canons,” according to this Court, is that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]” *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). As such, the civil monetary penalties authorized by the CFPA must be read distinctly from the damages or other monetary relief authorized by the same statute. *See Corley*, 556 U.S. at 314.

Construing the civil monetary penalties as act as a “surcharge” on violators for breaching their duties avoids such superfluity. *See CIGNA Corp.*, 563 U.S. at 442. The Bank, as a provider of retail banking, stock brokerage, insurance, and wealth management services to customers nationwide, has a fiduciary duty to its customers. FDIC, *Trust/Fiduciary Activities*, Banker Resource Center, <https://www.fdic.gov/resources/bankers/trust-fiduciary-activities/>. Historically, courts of equity imposed “surcharges” on holders of fiduciary duty that breached this duty. *CIGNA Corp.*, 563 U.S. at 442. The Bureau treats these penalties as a surcharge by channeling the funds acquired into the Civil Penalty Fund, where it compensates eligible classes of harmed consumers and provides funding for consumer education and financial literacy. 12 C.F.R § 1075 (2022). The “damages” imposed by the ALJ against Sutherland essentially act as a “surcharge” against the bank for its breach of fiduciary duty to its customers and to the general public. It does not, as compensatory damages do, make the Bank’s harmed customers whole.

**B. Adjudication of CFPA claims fall within the public rights exception to the Seventh Amendment.**

The Bank asserts that deception sounds in common law fraud, despite the lack of analogy, but the public rights exception nevertheless defeats the Seventh Amendment claim. This exception permits adjudication of common law claims without a jury when those claims fall within a

**Elizabeth (Betsy) Sheppard**  
Writing Sample

Congressionally-created public right. *See, e.g., Atlas Roofing*, 430 U.S. 442. Two major factors govern the existence of a public right: if existing private remedies were inadequate prior to Congressional intervention, *see, e.g., id.*, and if the right at issue is closely integrated with a public regulatory scheme. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985). Both of these factors apply to the UDAAP claims.

**1. Private existing remedies for harmed consumers were inadequate.**

Private remedies inadequately protected consumers prior to the passage of the Dodd-Frank Act, proving the existence of a public right. *See, e.g., Atlas Roofing*, 430 U.S. 442. In *Atlas Roofing*, the Court held that the adjudicative process created by the Occupational Safety and Health Act of 1970 (OSHA), 84 Stat. 1590, 29 U.S.C. § 651 et seq, did not violate the Seventh Amendment. *Atlas Roofing*, 430 U.S. at 461. That act imposed a “new statutory duty to avoid maintaining unsafe or unhealthy working conditions and empower[ed] the Secretary of Labor to promulgate health and safety standards.” *Id.* at 444–45. Before passing this law, Congress conducted an investigation, concluding that “work-related deaths and injuries had become a ‘drastic’ national problem[,]” and that the existing remedies “[were] inadequate to protect the employee population from death and injury due to unsafe working conditions[.]” *Id.* In upholding OSHA’s adjudicative power over seemingly private torts, the Court concluded that “when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’” *Id.* at 455.

The Bureau similarly remedies a pre-existing gap in the statutory scheme. Congress created the Bureau through the Dodd-Frank Act in response to the devastating 2008 financial crisis. As it had in its enactment of OSHA, Congress conducted extensive investigations, eventually concluding that “widespread failures in financial regulation and supervision proved devastating to

Elizabeth (Betsy) Sheppard  
Writing Sample

the stability of the nation's financial markets[.]” Fin. Crisis Inquiry Comm’n Final Report at xviii.<sup>1</sup>

Just as Congress created OSHA in response to inadequate worker-protections, Congress created the Bureau in response to the inadequacies of the existing consumer protection structure.

## **2. The UDAAP ban is closely integrated with the federal consumer protection scheme.**

Furthermore, the right of consumers to be free from unfair, abusive, or deceptive acts and practices is closely integrated with a public regulatory scheme, thus falling within the public rights exception. *Thomas*, 473 U.S. 568 at 594 (finding that the public rights exception includes cases involving “a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution[.]”).

Congress entrusted the Bureau with the enforcement of eighteen preexisting consumer financial protection statutes as well as the novel prohibition on UDAAPs. 12 U.S.C. §§ 5531, 5536. The regulatory scheme established by Dodd-Frank depends upon this consolidation. The government’s “inconsistent response added to the uncertainty and panic in the financial markets” during the 2008 financial crisis and the haphazard, multi-agency oversight of existing consumer protection statutes exacerbated financial panic. Fin. Crisis Inquiry Comm’n Final Report at xvii, xxi.

The Bureau’s enforcement data examples the practical integration of the UDAAP ban within the broader consumer protection scheme. CFPB, Enforcement Actions, <https://www.consumerfinance.gov/enforcement/actions/>. Every single case brought by the Bureau in 2022 alleged violations of the CFPA, usually alongside another consumer protection statute. *Id.* Seventeen of

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<sup>1</sup> In 2009 Congress created the Financial Crisis Inquiry Commission as part of the Fraud Enforcement and Recovery Act. to “examine the causes, domestic and global, of the current financial and economic crisis in the United States.” Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, § 5. The commission detailed its findings in the *Financial Crisis Inquiry Report*.

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those twenty enforcement actions asserted UDAAPs, and only two cases involved stand-alone allegations of deceit. *Id.* In nearly every case brought by the Bureau for deceitful actions, the Bureau simultaneously enforced at least one other statute in conjunction with the CFPA. *Id.*

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In conclusion, the Bureau’s use of an ALJ to resolve UDAAP claims under the CFPA did not violate the Seventh Amendment. *See Markman*, 517 U.S. at 376. The CFPA ban on UDAAPs is not a traditional common law claim, and it lacks a common law analogy because the UDAAP ban does not contain an element of intent. *See id.*; 8 James Wm. Moore et al., *Moore’s Federal Practice* § 38.110. Furthermore, the public rights exception renders the question of a common law analogy moot, because when it passed the CFPA ban on UDAAPs, Congress created a public right. 12 U.S.C. §§ 5531, 5536; *see Atlas Roofing*, 430 U.S. 442. For these reasons, the Bank’s Seventh Amendment claim must fail.

## **II. The Bureau’s dual-layer removal scheme for ALJs does not violate the separation of powers.**

The Bank’s separation of powers claim, too, must fail, because the dual-layer removal scheme for ALJs within the Bureau does not restrict the President’s ability to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3; *See Humphrey’s Ex’r v. U.S.*, 295 U.S. 602 (1935). ALJs within the Bureau and members of the Merit Systems Protection Board (the Board) are non-executive officers whose activities do not unduly interfere with the President’s oversight power. *See Humphrey’s Ex’r*, 295 U.S. 602.

By statute, administrative law judges receive removal protections through a two-layer scheme. 5 C.F.R. § 930.211 (2022); 5 U.S.C. § 1201 et seq. Removal of ALJs requires good cause, as determined by the Board, “after opportunity for a hearing[.]” 5 U.S.C. § 7521(a); 5 C.F.R. § 930.211 (2022), and the removal of Board members by the President requires “inefficiency,

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neglect of duty, or malfeasance in office.” 5 U.S.C. § 1202(d). The character and scope of duty of both the Board and Bureau ALJs permit this dual-layer protection scheme.

The ability of Congress to impose heightened removal protections depends in part “upon the character of the office.” *Morrison v. Olson*, 487 U.S. 654, 687 (1988) (citing *Humphrey’s Ex’r*, 295 U.S. at 631, 655); *see, e.g., Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 514 (2010) (invalidating a dual layer scheme when each layer involved wielded “significant executive power[.]”). Neither layer of officials involved in this removal process exercise significant executive power, rendering removal protections proper.

**A. ALJs are non-executive, quasi-judicial officials.**

The character of Administrative Law Judges authorizes removal protections. *See Morrison*, 487 U.S. at 687. ALJs are inferior officers, *Lucia v. SEC*, 138 S.Ct. 2044 (2018), who exercise quasi-judicial, non-executive power. Each of these characteristics independently permits heightened removal protections for ALJs. *See Morrison*, 487 U.S. at 691.

First, the position of ALJs as inferior officers within the executive branch warrants removal protections. The President does not wield unfettered power to freely remove inferior officers, particularly where the officers’ discretion is not “central to the functioning of the Executive Branch[.]” *Id.* at 691–92. In *Morrison*, the Court approved removal protections for an inferior officer within the executive branch. *Id.* at 671. In doing so, the Court clarified factors that distinguish an “inferior” officer from a “principal,” *id.*, which the Court later used to determine that ALJs are inferior officers. *Lucia v. SEC*, 138 S.Ct. at 2049.

In *Morrison*, the Court evaluated the removal protections within the Ethics in Government Act. 28 U.S.C. §§ 591–599 (1982 ed., Supp. V). The act “allow[ed] for the appointment of an ‘independent counsel’ to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws” and provided that the independent

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counsel could only be removed from office by Congressional impeachment or by the Attorney General for “good cause, physical disability, mental incapacity, or any other condition that substantially impair[ed] the performance of such independent counsel's duties.” *Morrison*, 487 U.S. at 660, 663. The Court found that “[a]lthough the counsel exercise[d] no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act,” the Court “simply d[id] not see how the President's need to control the exercise of that discretion [wa]s so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.” *Id.* at 691–2.

Secondly, ALJs are not purely executive officers, so the President’s need to control the exercise of ALJ discretion is not “so central to the functioning of the Executive Branch,” *id.*, as to require at-will ALJ termination. ALJs lack the power to issue final decisions; they may only issue recommended decisions to the Director of the Bureau, 12 C.F.R. § 1081.400 (2022), who is removable at will by the President. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183 (2020). As such, ALJs possess “purely recommendatory power,” opposed to the “enforcement or policy making functions” wielded by other members of the executive branch. *Free Enterprise Fund*, 561 US at 507 n.10. The President remains free to, through his Bureau director, alter ALJ decisions and exercise sufficient control over the executive branch. *Compare Sutherland Bank*, 505 F.4th 1 (noting that the Bureau director may set aside any findings or conclusions of an ALJ) with *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (invalidating a removal restriction when the executive officer “command[ed] the President himself to carry out” the officer’s order “without the slightest variation[.]”).

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**B. The Merit Systems Protection Board does not exercise executive power.**

The second layer of the dual-layer scheme concerns the Merit Systems Protection Board. Although members of the Board are principal, rather than inferior officers,<sup>2</sup> see *Edmond v. United States*, 520 U.S. 651, 663 (1997), “Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.” See *Free Enterprise Fund*, 561 U.S. at 843. Specifically, the Court permits this type of removal protection where the principal officers serve as members of a nonpartisan, independent, and non-executive body with staggered terms, created by Congress to “carry into effect legislative policies.” *Humphrey’s Ex’r*, 295 U.S. at 628. In these circumstances, the Court allows limiting removal to reasons of “inefficiency, neglect of duty, or malfeasance in office[.]” *Id.* at 624. These are the same reasons for which the President may remove Board members. 5 U.S.C. § 1202(d).

In addition to sharing the same removal standards, the Board shares each of the characteristics highlighted by the Court; the Board is also a nonpartisan, independent, and non-executive body with staggered terms that was created by Congress to “carry into effect legislative policies.” See 5 U.S.C. § 1201. As such, the Constitution permits these removal protections. See *Humphrey’s Ex’r*, 295 U.S. at 628.

**1. The Board was created to carry into effect legislative policies and adjudicate claims.**

The Constitution permits these removal protections because Congress created the Board to carry into effect legislative policies, namely the Merit Systems Principles. 5 U.S.C. § 2301(b); 5 C.F.R. 1200.1. The *Humphrey’s Executor* Court reasoned that

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<sup>2</sup> “[I]nferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the Senate’s advice and consent.”

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[t]he Federal Trade Commission[,] [a]s an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid . . . cannot in any proper sense be characterized as an arm or an eye of the executive.

*Humphrey's Ex'r*, 295 U.S. at 628. The Board, too, carries legislative policies into effect. Congress created the Board in 1978 to “ensure that all Federal government agencies follow Federal merit systems practices.” 5 C.F.R. 1200.1.

Furthermore, the Board’s primary adjudicatory role places it outside the executive. *See Wiener v. U.S.*, 357 U.S. 349, 356 (1958). The Board “is an independent Government agency that operates like a court” and “adjudicates individual employee appeals and conducts merit system studies.” *About MSPB*, U.S. Merit Systems Protection Board, <https://www.mspb.gov/about/about.htm>.

The Constitution does not directly confer Presidential removal power over “a member of an adjudicatory body . . . merely because [the President] want[s] his own appointees on such a Commission[.]” *Wiener*, 357 U.S. at 356. The ability of a body to hear claims and issue final decisions that are not subject to review by any other official or court indicates adjudicatory power. *See id.* at 354–55. Likewise, the Board hears and adjudicates claims over which it exercises the power of final decision, 5 U.S.C.A. § 1204 (a)(1), and therefore “cannot in any proper sense be characterized as an arm or an eye of the executive.” *Humphrey's Ex'r*, 295 U.S. at 628; *see Wiener*, 357 U.S. at 354–55.

## **2. Congress intended the Board to be a non-partisan, independent commission.**

Furthermore, Congress intended the Board to be a non-partisan, independent commission, which takes the Board outside of the President’s direct control. *See Humphrey's Ex'r*, 295 U.S. at 629 (finding that Congress possesses the constitutional authority to create “quasi legislative or

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quasi judicial agencies, [and] to require them to act in discharge of their duties independently of executive control[.]”). Some agencies conduct tasks that “require absolute freedom from Executive interference,” *Wiener*, 357 U.S. at 353, because “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.” *Id.* To determine the necessity of freedom from the Executive, the Court considers the nature of the function that Congress vested in the agency at issue. *Id.*

The appointment process for Board members demonstrates that Congress intended independence. 5 U.S.C. §§ 1201–02; *see Humphrey's Ex'r*, 295 U.S. at 624. In *Humphrey's Executor*, the Court upheld for cause removal protections of FTC commissioners because Congress intended the commission to be independent. *Humphrey's Ex'r*, 295 U.S. at 624. The Court reasoned that Congress composed the FTC of commissioners serving seven-year staggered terms, “so arranged that the membership would not be subject to complete change at any one time[.]” *Id.* Likewise, members of the Board serve seven-year staggered terms. *See* 5 U.S.C. §§ 1201–02; 5 C.F.R. § 1200.2. As the President serves a term of four years, U.S. Const. art. II, § 1, no President can appoint his own Board majority in a given term, demonstrating Congress's intent that the Board would not be subject to complete change by any one President. 5 C.F.R. § 1200.2; *see Humphrey's Ex'r*, 295 U.S. at 624.

At-will removal of Board members would erode this independence. *Cf Morrison*, 487 U.S. at 687–88 (“Were the President to have the power to remove FTC Commissioners at will, the ‘coercive influence’ of the removal power would ‘threate[n] the independence of [the] commission.’”). Because the Board wields jurisdiction over various subjects that could put the Board at odds with the President, *see, e.g.*, 5 C.F.R. § 1200.10 (2022), removal protections safeguard the Board from conflicts of interest, notably in cases concerning the President's

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executive officers or political allies. *See Wiener*, 357 U.S. at 353. For example, the Board has original jurisdiction over alleged violations of the Hatch Act, which prohibits federal employees from using their official authority or influence to affect the outcome of an election. 5 C.F.R. § 1201.121 (2022); 5 U.S.C. § 7323. As the President is an elected official and political leader, these types of claims could create conflict between the President and the Board.<sup>3</sup> Consider a civil servant who inappropriately campaigns for the President’s re-election. The President, under the Bank’s proposed at-will removal power, could simply dismiss the Board members who would sanction his supporter, putting pressure on the Board to obey the President’s wishes instead of the Merit Systems Principles. *See Wiener*, 357 U.S. at 353. Congress structured the Board as to insulate it from such undue influence, and therefore, the Constitution permits heightened removal protections. *See Morrison*, 487 U.S. at 687–88

**C. The removal process remains exclusively in the Executive Branch.**

Additionally, the Constitution permits this dual-layer removal process because the removal power remains within the Executive Branch. *See Morrison*, 487 U.S. at 686. In *Bowsher*, the Court invalidated an act which made an executive officer “removable not by the President but only by a joint resolution of Congress or by impeachment[.]” 478 U.S. at 728. Similarly, in *Myers*, the Court invalidated a removal scheme requiring the Senate to consent to removal. *Myers v. United States*, 272 U.S. 52, 106, 176 (1926). Conversely, the removal scheme at issue in *Morrison* “put[] the removal power squarely in the hands of the Executive Branch; an independent counsel [could] be

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<sup>3</sup> Hatch Act allegations typically begin in the Office of Special Counsel, which diverts the official accused of violating the act to the Board for proceedings, unless that official was nominated by the President and confirmed by the Senate. 5 U.S.C. 1215. Upon a finding by the Office of Special Counsel that an official who was appointed by the President and confirmed by the Senate violated the Hatch Act, the office refers them not to the Board, but rather to the President. 5 U.S.C. 1215(b).

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removed from office, ‘only by the personal action of the Attorney General, and only for good cause.’ *Morrison*, 487 U.S. at 686. For this reason, the Court upheld the *Morrison* scheme. *Id.*

Likewise, in creating the Bureau, Congress kept the removal process for ALJs in the Bureau “squarely in the hands of the Executive Branch” under the Merit Systems Protection Board. *Id.*; 5 U.S.C. § 7521(a). The removal process for Board members also remains in the hands of the Executive Branch, as only the President may remove them for the enumerated reasons. 5 U.S.C. § 1202(d). As such, the Constitution permits this removal process.

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For each of these reasons, the dual-layer removal scheme does not violate the separation of powers as it applies to officers that wield no executive power. ALJs are quasi-judicial, inferior officers, and because the Bureau director, whom the President may remove at-will, may unilaterally reverse ALJ decisions, the President remains free to “take care” that the law be faithfully executed. 12 C.F.R. § 1081.400 (2022); *Seila L. LLC*, 140 S.Ct. 2183. The Board, too, is non-executive. It is a quasi-judicial body that operates like a court in order to “carry into effect” the Merit Systems Principles. *See* 5 U.S.C. § 2301(b); 5 C.F.R. 1200.1. For each of these reasons, the Bank’s separation of powers claim must also fail.

### **III. Conclusion**

The 2008 financial crisis did not only cost Americans millions of dollars—it harmed “real people and real communities.” Fin. Crisis Inquiry Comm’n Final Report at xvxi–vii. In an effort to safeguard the American public from further harm, Congress enacted the ban on unfair, deceptive, or abusive acts and practices. The Bank nevertheless deceived American consumers, and now attempts to escape accountability, unconcerned about the damage it leaves in its wake. The Consumer Financial Protection Bureau urges this Court to affirm.

## Applicant Details

First Name **Catherine**  
 Middle Initial **N**  
 Last Name **Sherman**  
 Citizenship Status **U. S. Citizen**  
 Email Address [cns57@georgetown.edu](mailto:cns57@georgetown.edu)

Address

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City <b>Washington</b>
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Country <b>United States</b>

Contact Phone Number **4408216738**

## Applicant Education

BA/BS From **University of Virginia**  
 Date of BA/BS **May 2019**  
 JD/LLB From **Georgetown University Law Center**  
[https://www.nalplawschools.org/employer\\_profile?FormID=961](https://www.nalplawschools.org/employer_profile?FormID=961)  
 Date of JD/LLB **June 5, 2024**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **American Criminal Law Review**  
 Moot Court Experience **No**

## Bar Admission

## Prior Judicial Experience

Judicial Internships/  
Externships      **Yes**  
Post-graduate Judicial  
Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Luban, David  
luband@georgetown.edu  
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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Catherine Sherman**

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June 11, 2023

The Honorable Jamar K. Walker  
U.S. District Court for the Eastern District of Virginia  
Walter E. Hoffman U.S. Courthouse  
600 Granby Street  
Norfolk, Virginia 23510

Dear Judge Walker:

I am a rising third-year law student in the top ten percent of my class at Georgetown University Law Center, and I am writing to apply for a 2024-2025 term clerkship in your chambers. I intend to live and practice law in Virginia long-term, so I would be thrilled to serve the Eastern District of Virginia as your clerk.

As an aspiring prosecutor, I would welcome the opportunity to learn from you, given the knowledge and perspective you gained from your experience as a federal prosecutor. I have thoroughly enjoyed my experiences working with two prosecutors' offices because I enjoy working to pursue justice on behalf of the community. I have also learned quickly in those dynamic environments, researching and analyzing a wide range of legal issues from evidentiary issues to substantive legal issues regarding various crimes. Beyond my experiences working for prosecutors' offices, my other professional and academic experiences have allowed me to hone my analytical and writing skills. As a student at Georgetown Law, I am a Managing Editor of the *American Criminal Law Review*, which has elevated my writing and editing skills. I have thrived in this challenging role because of my attention to detail, strong work ethic, and excitement about contributing to legal scholarship. This past spring, I was a judicial intern for Judge Carl Nichols on the U.S. District Court for D.C., where I refined my writing skills, drafting opinions and memoranda. These experiences, and my enjoyment of legal writing, have led me to become a skilled and analytical writer, who would excel as a clerk in your chambers.

My resume, writing sample, transcript, and letters of recommendation are submitted with this application, and I am happy to provide any other information or materials. Thank you for your time and consideration.

Sincerely,  
Catherine Sherman

## Catherine Sherman

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### EDUCATION

#### Georgetown University Law Center

*Juris Doctor*

Washington, D.C.

Expected June 2024

- GPA: 3.9/4.0
- Honors and Awards: Top 10%; Dean's List
- Activities: Volume 61 Managing Editor, *American Criminal Law Review*; Vice President of Prosecution Programming, Georgetown Criminal Law Association

#### University of Virginia

*Bachelor of Arts in Economics with Distinction*

Charlottesville, VA

May 2019

- GPA: 3.73/4.0
- Honors and Awards: Dean's List for 5 of 7 eligible semesters (semester abroad was not eligible for Dean's List)
- Study Abroad: Law and Criminology Program at Vrije Universiteit Amsterdam, January 2018 – June 2018

### PROFESSIONAL EXPERIENCE

#### United States Attorney's Office for the Northern District of California

*Law Clerk*

San Francisco, CA

June 2023 – present

- Support Assistant U.S. Attorneys in the Criminal Division by conducting legal research and analyzing legal issues for ongoing cases
- Drafted memorandum, which was used to write a prosecution memorandum, summarizing the factual background and analyzing whether the elements of the crime were satisfied for a felon in possession case

#### United States District Court for the District of Columbia, Judge Carl J. Nichols

*Intern*

Washington, D.C.

January 2023 – April 2023

- Drafted two opinions: one regarding a motion for attorney's fees under the Equal Access to Justice Act and another regarding a motion to dismiss for lack of personal jurisdiction
- Wrote several memoranda analyzing pre-trial motions in criminal prosecutions of defendants charged with crimes related to the events of January 6, 2021
- Wrote a memorandum providing an outline for an opinion on a motion to dismiss for a disability discrimination case involving claim preclusion and preclusion by a workers' compensation statute

#### Office of the Commonwealth's Attorney for Arlington County and the City of Falls Church

*Intern*

Arlington, VA

June 2022 – August 2022

- Researched various legal issues, such as the right to retain counsel, subject matter jurisdiction, and examining a hostile witness, and summarized research findings in memoranda for Assistant Commonwealth's Attorneys
- Helped write motions by adding legal reasoning and case law to support supervising attorney's arguments
- Collected evidence by reviewing interrogation videos in preparation for a murder trial
- Researched rehabilitation strategies for batterers in support of plea negotiations with defendant

#### Bates White

*Consultant II*

Washington, D.C.

September 2020 – July 2021

- Worked with teams to support parties to litigation or involved in federal merger review process
- Produced client deliverables, including memoranda, white papers, and presentations, explaining the results of team's data analysis and research in antitrust and product liability cases
- Conducted document review and analysis of over 1,000 articles detailing judgments in asbestos cases
- Managed team of three to create a database for analysis of outcomes in asbestos cases

*Consultant I*

September 2019 – August 2020

- Drafted language for white papers on competitive effects of \$17B merger for end client
- Owned responsibility for data processing and analysis and document review for one of the two main lines of business in merger case, producing results which were critical for our communications with DOJ
- Managed two Consultants; created workplans, guided execution of tasks, and reviewed work

*Summer Consultant*

June 2018 – August 2018

- Collaborated with team of 20 to produce an expert report for Apple Inc. in *Apple Inc. v. Qualcomm Inc.*, a lawsuit regarding monopolization and intellectual property in the technology industry

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Catherine Nicole Sherman  
GUID: 828096822

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center  
Juris Doctor  
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	95	Civil Procedure David Vladeck	4.00	B+	13.32	
LAWJ	002	51	Contracts Michael Diamond	4.00	A	16.00	
LAWJ	003	51	Criminal Justice Michael Gottesman	4.00	A	16.00	
LAWJ	005	51	Legal Practice: Writing and Analysis Frances DeLaurentis	2.00	IP	0.00	
EHrs QHrs QPts GPA							
Current	12.00	12.00	45.32	3.78			
Cumulative	12.00	12.00	45.32	3.78			

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	004	95	Constitutional Law I: The Federal System Paul Smith	3.00	A	12.00	
LAWJ	005	51	Legal Practice: Writing and Analysis Frances DeLaurentis	4.00	A	16.00	
LAWJ	007	95	Property John Byrne	4.00	A	16.00	
LAWJ	008	95	Torts Kevin Tobia	4.00	A	16.00	
LAWJ	790	50	Criminal Law Across Borders David Luban	3.00	A	12.00	
Dean's List 2021-2022							
EHrs QHrs QPts GPA							
Current	18.00	18.00	72.00	4.00			
Annual	30.00	30.00	117.32	3.91			
Cumulative	30.00	30.00	117.32	3.91			

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	126	05	Criminal Law Paul Butler	3.00	A	12.00	
LAWJ	1493	05	Prison Law and Policy Shon Hopwood	3.00	A	12.00	
LAWJ	165	02	Evidence Michael Pardo	4.00	A	16.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	A	16.00	
EHrs QHrs QPts GPA							
Current	14.00	14.00	56.00	4.00			
Cumulative	44.00	44.00	173.32	3.94			

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	134	05	Decedents' Estates	4.00	B+	13.32	
LAWJ	1491	10	Externships I Seminar (J.D. Externship Program)		NG		
LAWJ	1491	86	~Seminar	1.00	A	4.00	
LAWJ	1491	88	~Fieldwork 3cr	3.00	P	0.00	
LAWJ	1538	05	Constitutional Law: The First and Second Amendments Thomas Hardiman	1.00	P	0.00	
LAWJ	1652	05	Criminal Justice II: Criminal Trials	3.00	A	12.00	
LAWJ	361	03	Professional Responsibility	2.00	A	8.00	
Transcript Totals							
EHrs QHrs QPts GPA							
Current	14.00	10.00	37.32	3.73			
Annual	28.00	24.00	93.32	3.89			
Cumulative	58.00	54.00	210.64	3.90			
End of Juris Doctor Record							

**Georgetown Law**  
600 New Jersey Avenue, NW  
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

My former student Catherine Sherman has applied for a clerkship in your chambers, and has asked me to provide a recommendation. It's a pleasure to do so, because she is an outstanding student who I believe will be equally outstanding as a law clerk.

Catherine took my 1L elective class "Criminal Law Across Borders" in spring 2022. Its subject matter combines the application of federal criminal law to extraterritorial conduct, and international criminal law—the law of war crimes, crimes against humanity, and genocide. The course provides students with an introduction to international law, to basic criminal law, and the interpretation of treaties and federal statutes. At Georgetown, students take criminal procedure rather than substantive criminal law in their 1L year, so for many of them my course is their first exposure to concepts of actus reus and mens rea, elements analysis, sentencing policy, and criminal defenses. On the international law side, we spend a lot of time on jurisdiction, as well as the basics of customary and treaty law and their role in our constitutional system.

Catherine was a standout: she wrote the best exam out of 45 students in the class. Her performance is consistent with her other grades: I see from her transcript that apart from a single B+ in her first semester, she has been a straight-A student through her first three semesters of law school. That places her near the top of a very strong student cohort. The writing sample she showed me—a brief she wrote for her Legal Practice course—confirms that she is a strong, clear writer with excellent analytical skills.

Catherine tells me that she has been interested in criminal justice issues since she was in middle school, but it wasn't until a college course on civil rights and the Constitution that she realized that she wants to pursue justice as a prosecutor—which remains her ambition as she goes into her final year in law school. This past summer, interning at the Arlington, Virginia Commonwealth Attorney's Office, she worked on structuring a plea deal for a young defendant who had committed violence against an intimate partner. She researched rehabilitation programs and studied the social science of rehabilitation—at the direction of her supervisor—in an effort to avoid sending the offender to prison without any support. Catherine wrote me that "it was so encouraging to work with a prosecutor who was searching for the just outcome, not the easy or obvious one. This is the kind of prosecutor I want to be: a prosecutor who treats all parties with dignity and seeks to resolve the root causes of crime." I know many law students interested in criminal justice reform, but almost none who see themselves as prosecutors rather than defenders. I really appreciate this in Catherine, because it shows a laudable independence of mind and a thoughtful understanding of the prosecutor's role.

From talking with Catherine both in and out of class, I believe that she is mature and responsible. I have no doubt that she would work well in your chambers, and she has my very strong recommendation. I would be happy to answer any questions you might have.

Yours very truly,

David Luban  
Distinguished University Professor  
Georgetown University Law Center

David Luban - luband@georgetown.edu - 3013355506

**Georgetown Law**  
600 New Jersey Avenue, NW  
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter with enthusiastic support for Catherine Sherman, who is applying for a clerkship in your chambers. I write to share my experiences as her professor, and why she has demonstrated that she would be a great fit for a clerkship.

As her resume and transcript demonstrate, Catherine is committed to achieving academic excellence during her time in law school. She graduated with distinction from the University of Virginia, and she has one of the highest GPA's for her class at Georgetown Law. She has also received many academic honors, including being on the Dean's List. She has provided outstanding research and editing assistance, and I've learned to count on her to be diligent and conscientious.

Catherine already has significant and varied legal experience. Prior to law school, she worked for a litigation firm. Catherine has also shown a strong commitment to public interest work through interning for a prosecutor's office in Virginia and for a federal district court judge here in Washington DC. She continues to be an editor for the American Criminal Law Review.

From my conversations with Catherine and her participation in my classes, it is clear that she aspires to use her legal education to help others and to bridge the gap in access to justice. She has a sincere desire to understand how the law impacts the real world and to use the law as a tool to effect change beyond the classroom. She is a delight to be around, and I have no doubt that she will excel in a clerkship setting.

If you need any additional information, please do not hesitate to contact me.

Sincerely,

Shon Hopwood

Shon Hopwood - [srh90@georgetown.edu](mailto:srh90@georgetown.edu)

Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

Catherine Sherman is one of the most impressive students in Georgetown's Class of 2024. And her strengths are precisely those that would make her a superb judicial law clerk.

Catherine has been a student in two of my courses: Criminal Justice I (Criminal Investigations) in her first year, and Criminal Justice II (Criminal Trials) in her second. She has been a superstar in each. An active participant in class discussions, she has repeatedly demonstrated a capacity to extract every nuance from the decisions we've read, to recount with remarkable precision the precise holdings and what was merely dictum, and to project this information with great agility to the resolution of unsettled legal issues. She also has an exceptional ability to master complex statutes. (I've reserved to the end of this letter a description of her most recent performance, which typifies her extraordinary analytical reasoning and precision, so as not to interrupt the flow.)

Catherine's final exam in my Criminal Justice I course was superbly written and beautifully reasoned, and came within a hair's breadth of capturing the one A+ we're allowed to award. I've just completed grading my Criminal Justice II exams, and once again Catherine scored well above the number needed for an A. This wasn't just an A, it was one of the highest A's in the class.

My assessment of Catherine's capacities is plainly shared by my colleagues. She has a 3.94 GPA after three semesters, having scored an A grade in 11 of the 12 courses (the lone exception was in her first semester). Her resume recites that she is in the top 10% of the class, but she clearly stands much higher than that. The law school doesn't give students their precise standing, but instead provides only the GPA cutoff for being in the top 10%, which was 3.85. Catherine 3.94 is so far above that; it must surely be in the top 5% and quite likely higher than that.

Catherine is dedicated to a career as a prosecutor. She is managing editor of our criminal law journal. The just-completed Criminal Justice II class in which she starred is an elective, and virtually all the 70 students in the class are dedicated to careers as either prosecutors or public defenders. Among these were many of the top students in the law school, yet Catherine clearly stood out.

I've gotten to know Catherine rather well not only from her performance in class, but also in after-class discussions and during office hours. She is friendly and has a lovely, low-key personality. I'm certain she'd be a joy to work with for all in chambers.

And now, as promised, the most recent example of Catherine's attention to detail and analytical strengths. We spent the last two weeks of the Criminal Justice II course on habeas, and I had the students dig deeply into the text of the federal habeas statutes (28 U.S.C. §§ 2241-44, 2254-55). One day was devoted to *Jones v Hendrix*, still pending decision at this writing, in which the Supreme Court will decide whether a prisoner who has previously filed a motion under 2255 can file a habeas petition to contest his conviction in light of the *Rehaif* decision. The defendant had been convicted of felony gun possession, with the judge not instructing the jury that knowledge of felony status was an element of the crime, indeed with the judge not permitting the defendant to introduce evidence of his lack of knowledge. 2255(h) states that a second motion under 2225 is allowable only if there is new evidence or if a new rule of (substantive) constitutional law has been announced by the Supreme Court. Conspicuously absent is any reference to a new rule of statutory interpretation. The defendant is contending that he should be allowed to file a true habeas petition, by virtue of the "savings" clause in 2225(e) allowing resort to habeas if "the remedy by motion is inadequate or ineffective to test the legality of his detention."

In advance of class, I provided the students portions of the briefs on both sides – which deployed innumerable interpretative arguments in support of their respective positions. In class, I called upon Catherine, and asked her first to describe the arguments on each side. She proceeded to do so, without reference to notes, and identified with total accuracy every single argument made by each side. I then asked her to state which side should prevail. She opined that the argument against allowing resort to habeas seemed stronger if one employs the traditional tools of statutory interpretation, but noted that this would mean that a person who might be innocent (because he didn't know he had previously been convicted of a felony) might remain in prison without ever having a chance to show that one of the necessary elements of the crime was missing, and without a jury ever having passed on the existence of that element. (He had been denied that chance at trial, and the jury that convicted him had not been instructed that it needed to make a finding on this element.) Catherine wondered whether 2255 might be an unconstitutional suspension of habeas if so construed, and whether accordingly the Court might give the less obvious interpretation of 2255 when the defendant has a colorable claim of innocence.

This was a stunning performance, not the least because it came during the last week of classes and just a few days before exams were to begin, a time when most students' attention to detail falls below their usual standard. And this was not a unique

Michael Gottesman - gottesma@law.georgetown.edu - 202-662-9482

experience for Catherine; it was simply the last in a series of similar presentations during the semester.

In sum, Catherine would be a perfect judicial law clerk. She has great analytic ability, she is a stickler for detail, she writes beautifully, and she has a winning personality, I've taught roughly 200 of the students in Georgetown's Class of 2024. There is only one other I would deem on par with Catherine.

Sincerely,

Michael Gottesman  
Reynolds Family Endowed Service Professor

Michael Gottesman - gottesma@law.georgetown.edu - 202-662-9482

**Catherine Sherman**

150 Q St. NE, Apt. 1321, Washington, D.C. 20002 | (440)-821-6738 | cns57@georgetown.edu

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**Writing Sample**

The following writing sample is a brief I wrote for my Legal Practice course in April 2022. I was instructed to write a brief on behalf of the defendant, Warden Herman Carter, requesting the United States District Court for the Eastern District of Arkansas grant his motion for summary judgment. The issue in this case is whether Warden Carter violated a prisoner's constitutional rights when he denied the prisoner access to six sports magazines. This brief is my own work and has not been edited by anyone other than me.

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS

Mark Webster,

Plaintiff,

Civil Action No. 22-123

v.

Herman Carter,

Defendant.

BRIEF OF DEFENDANT HERMAN CARTER IN SUPPORT OF  
HIS MOTION FOR SUMMARY JUDGMENT

DATED: June 11, 2023

COUNSEL FOR Herman Carter

### Introduction

Warden Herman Carter's decision to withhold six sports magazines from prisoner Mark Webster during the NCAA tournament was not a violation of Webster's First Amendment rights under *Turner v. Safley*, 482 U.S. 78 (1987). Withholding the magazines was rationally related to security, a legitimate and neutral governmental interest, because Carter reasonably concluded that withholding the magazines would reduce the risk of unrest, as competition over the NFL playoffs had recently caused unrest among prisoners. Webster had alternative means to exercise his right to access information about sports, including T.V., magazines, and newspapers. Allowing Webster to access the magazines would have a significant ripple effect on the prison, as the magazines would be easily disseminated and would have a disruptive and disorderly effect on the prison. Finally, there are no alternative regulations that would pose a de minimis cost to the prison, as page-by-page censorship and maintaining different policies across different dorms both require additional resources and would risk greater harm than withholding the magazines. For these reasons, Carter asks the court to grant his motion for summary judgment.

### Statement of Facts

Langley Correctional Facility ("LCF") is an Arkansas state prison with two units: the Central Unit has maximum and medium security facilities, and the East Unit has a minimum security facility, consisting of five dorms. R.6.

In January and February 2022, during the NFL playoffs, LCF experienced an increase in prisoner disputes, including two physical altercations, as well as a decrease in prisoner productivity. R.8. Prison staff believed the unrest was caused by unhealthy competition over the NFL playoffs. R.8. Prisoners organized groups supporting different teams, particularly in East Dorms R and T, but there was no unrest in East Dorm S. R.8, 13. Prisoners also shared sports

publications, gambled on NFL games, and refused to work with prisoners who supported opposing teams. R.8.

To reduce unrest, distractions, and the number of publications circulating among prisoners during the NCAA playoffs, March Madness, LCF's Warden Herman Carter ordered prison staff to withhold the February, March, and April issues of sports publications from prisoners. R.8-9. Carter also ordered that magazines containing extensive coverage of March Madness be removed from the Dayrooms, LCF's recreational rooms. R.9. These magazines also contained blank championship brackets, which prisoners could use to bet on games and to form unsanctioned tournament pools. R.9.

Newspapers, T.V., including local sports news, and sports magazines that were not intensely focused on March Madness remained available in the Dayrooms. R.9. There are sports sections and some brackets in the newspapers, but the limited availability led Carter to believe the brackets could not be used for a tournament pool. R.9, 14. Carter also did not want to deprive prisoners of all newspapers. R.9.

Under Carter's policy, three issues of both *Sports Illustrated* and *CollegeJam* were withheld from prisoner Mark Webster. R.13. Webster receives these publications monthly and had never been denied another issue of the publications. R.7-8.

Webster is serving a thirty-month sentence for a drug offense. R.12. He is housed in East Dorm S, which houses ninety-six nonviolent prisoners with the lowest level of security needs. R.7. Prisoners in this dorm have access to T.V. in the Dayrooms and can purchase a T.V. from the prison canteen for their bunks, which Webster had done. R.7, 12.

After Webster learned that the magazines were being withheld, he appealed the decision. R.8. Webster argued that the magazines did not threaten security and told Carter that the March

2022 issue of *CollegeJam* had a feature on Longview College, where Webster's brother plays basketball, that included photos and an interview of Webster's brother. R.9, 13. Newspapers, national publications, and local T.V. generally do not include coverage of Longview. R.12-14. Webster suggested that the prison cut out the feature from the issue and provide it to him, but Carter rejected this proposal. R.9. Though Webster had not caused unrest during the NFL playoffs, Carter concluded that making an exception for Webster would anger other prisoners and that LCF did not have enough prison staff to cut out specific articles for all prisoners upon request. R.9. Carter denied Webster's appeal. R.9.

Webster filed a complaint with the United States District Court for the Eastern District of Arkansas alleging that withholding the sports publications violated his First Amendment rights. R.14. On March 31, 2022, Carter moved for summary judgment. R.5.

### **Argument**

#### **I. WITHHOLDING THE MAGAZINES FROM WEBSTER WAS REASONABLE UNDER THE *TURNER* TEST.**

When prison regulations impinge on a prisoner's constitutional rights, the court applies the four-factor balancing test from *Turner*. 482 U.S. at 89. The court considers (1) whether the regulation is rationally related to a legitimate and neutral governmental interest, (2) whether there are alternative means for the prisoner to exercise the asserted right, (3) the impact that accommodating the asserted right will have on the prison, and (4) whether there are alternative regulations that would fully accommodate the prisoner's right at a de minimis cost to the prison. *Thornburgh v. Abbott*, 490 U.S. 401, 414, 417-18 (1989).

**A. Withholding the Magazines is Rationally Related to Security, a Legitimate and Neutral Governmental Interest, Because Carter Reasonably Concluded that the Magazines Were Likely to Cause Unrest.**

To satisfy the first prong of the *Turner* test, prison security must be a legitimate and neutral governmental interest, and there must be a rational connection between denying the magazines and prison security. *See id.* at 414.

**1. Security is a legitimate governmental interest.**

Webster was denied access to the magazines due to security, a legitimate governmental interest. When a prison's objective is to exercise a valid function of the correctional system, the objective is legitimate. *See Pell v. Procunier*, 417 U.S. 817, 822-23 (1974). Ensuring prison security must be a valid function of the correctional system because it is essential to the operation of the correctional system. Furthermore, courts have repeatedly held that security is a legitimate governmental interest. *Thornburgh*, 490 U.S. at 415; *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 983 (8th Cir. 2004) ("security is the most compelling government interest"). Therefore, security is a legitimate governmental interest.

**2. Security is a neutral governmental interest.**

Security is a neutral governmental interest. A governmental interest is neutral when it is "unrelated to the suppression of expression." *Thornburgh*, 490 U.S. at 415. As evidence of the interest's neutrality, the court also asks whether the regulation is neutral in operation. *Id.* When a prison differentiates between publications based on their potential impact on prison security, the regulation is neutral. *Id.* at 415-16. Security is a matter of safety and order, not of suppressing expression. Courts have consistently found security to be a neutral interest. *See id.*; *Dawson v. Scurr*, 986 F.2d 257, 260-61 (8th Cir. 1993). The denial of the magazines was also neutral in operation. The magazines were identified as posing a risk to security because the content was

likely to cause unrest among prisoners. Therefore, these magazines were distinguished from other materials based on their potential impact on security. Security is a neutral governmental interest, and the denial of the magazines operated in a neutral way.

**3. There is a rational connection between denying the magazines and prison security.**

Denying Webster access to the magazines was rationally related to security because the magazines could reasonably be expected to provoke unrest. A regulation is rationally related to the governmental interest if the prison reasonably concluded that the regulation would advance the governmental interest. *Sisney v. Kaemingk*, 15 F.4th 1181, 1190-91 (8th Cir. 2021). *Simpson v. County of Cape Girardeau, Missouri*, 879 F.3d 273, 279-80, 282 (8th Cir. 2018) held that a prison regulation limiting incoming mail to postcards was rationally related to security because it reduced the risk of contraband entering the prison by mail. The prison did not need to show that contraband had previously entered the prison by mail or that the policy would actually further security. *Id.* at 280. Rather, the court asked whether it was reasonable to think that the policy would reduce the risk of an incident occurring. *Id.* *Simpson* demonstrates the substantial deference courts owe to prisons when reviewing prison regulations. *See, e.g., Thornburgh*, 490 U.S. at 408; *Murchison v. Rogers*, 779 F.3d 882, 888 (8th Cir. 2015). Similar to the prison in *Simpson*, Carter acted to reduce the risk of an incident that would threaten security. Carter reasonably believed that the February, March, and April issues of *Sports Illustrated* and *CollegeJam* would contain coverage of March Madness. The magazines would prompt increased focus on the tournament and may provide prisoners with brackets to use in unsanctioned tournament pools. This activity would reasonably be expected to cause unrest, given LCF's recent experience with violence due to unhealthy competition during the NFL playoffs.

Therefore, Carter reasonably concluded that withholding Webster's magazines would reduce the risk of unrest, and his decision was rationally related to security.

The availability of other information about sports within the prison is not inconsistent with Carter's decision to withhold the six magazines. Prisons can distinguish between similar materials based on the threat they pose to the prison, *see Dawson*, 986 F.2d at 262, as long as permitted materials containing the same type of content as prohibited materials are not so widespread within the prison as to make the prison's actions arbitrary, *Murchison*, 779 F.3d at 890-91. Carter identified and withheld a particularly threatening type of sports content, information about March Madness. While Carter has permitted some information about March Madness to remain available to prisoners, it is deliberately limited. There is limited availability of newspapers, and the remaining magazines do not contain extensive March Madness coverage. The sports content allowed within the prison provides alternative means to access information about sports but is not permitted so loosely as to make the prison's actions arbitrary.

**B. Webster Has Alternative Means to Exercise His Right to Access Information About Sports, Including T.V., Magazines, and Newspapers.**

Webster's asserted right is the right to access information about sports. Under *Turner*, the asserted right should be defined "expansively." *Thornburgh*, 490 U.S. at 417. Therefore, Webster's right is not the right to access a particular article, as this would be a narrow view, but the right to access information about sports.

Information about sports is available to Webster through alternative means. Alternative means to exercise a prisoner's right to access information exist when the subject matter sought is available from other sources and, where a publication is sought, if other issues of the publication are available. *Murchison*, 779 F.3d at 891. In *Murchison*, the prison denied Murchison access to a *Newsweek* magazine that contained an article about drug cartels. *Id.* at 885-88. The court did

not consider whether the specific article was inaccessible but whether the entire subject matter or publication had been banned. *Id.* at 891. Murchison had alternative means to exercise his right because he had access to other issues of *Newsweek* and to information about drug cartels through materials in the prison library. *Id.* Similar to Murchison, Webster has alternative means to exercise his right because the publications he seeks have not been entirely banned, and the subject matter he seeks is available from other sources. Webster has access to information about sports through the televisions in his bunk and the Dayroom, other sports magazines, and newspapers. Therefore, Webster has alternative means to access information about sports.

**C. Accommodating Webster's Asserted Right by Allowing Him to Receive the Magazines Would Cause a Ripple Effect on the Prison.**

Providing Webster with the magazines would have a significant ripple effect on the prison. When accommodating the asserted right will have a significant ripple effect on the prison, the third *Turner* factor weighs in favor of the prison's regulation. *Turner*, 482 U.S. at 90. When the asserted right is the right to access information, a significant ripple effect will occur when that information is likely to be disseminated throughout the prison, *Sisney*, 15 F.4th at 1191, and would have a disruptive and disorderly effect on the prison, *Murchison*, 779 F.3d at 891-92. Publications are easily disseminated and would likely be shared with other prisoners, as LCF experienced during the NFL playoffs. *See Thornburgh*, 490 U.S. at 412. Webster's magazines would also have a disruptive and disorderly effect on the prison, leading to violence and unrest prompted by competition over March Madness, similar to Carter's experience during the NFL playoffs. This harm to security and order constitutes a significant ripple effect.

**D. There Are No Alternative Regulations that Would Fully Accommodate Webster's Right at a de Minimis Cost to the Prison.**

There are no alternatives to the prison's decision that pose a de minimis cost to the prison. An alternative regulation poses a de minimis cost if it does not require additional resources, *see Murchison*, 779 F.3d at 892-93, and would not lead to greater harm as compared to the current regulation, *Thornburgh*, 490 U.S. at 419. Webster suggested that prison staff cut out the article he was interested in reading about Longview College and provide it to him. Carter rejected this alternative because it would either lead to greater unrest, as other prisoners would be angry that Webster received special treatment, or would require the prison to cut out specific articles for any prisoner upon request, demanding significant prison resources. The Eighth Circuit has previously rejected this alternative. *See Murchison*, 779 F.3d at 892-93 (finding that requiring prison staff to remove a violent article from a magazine before providing it to Murchison did not pose a de minimis cost); *Sisney*, 15 F.4th at 1193 (noting that page-by-page censorship is not a viable alternative). The same reasoning holds for requiring the prison to make different policies for different dorms based on security needs. Prisoners would likely be angered by another dorm's special treatment, and enforcing different policies among several dorms would require more prison resources. Therefore, there are no alternatives to withholding the magazines that do not require additional resources and would not lead to greater harm to the prison.

**Conclusion**

For these reasons, Herman Carter asks the Court to grant his motion for summary judgment.

## Applicant Details

First Name **Danny**  
 Last Name **Shokry**  
 Citizenship Status **U. S. Citizen**  
 Email Address [ds1768@georgetown.edu](mailto:ds1768@georgetown.edu)  
 Address

**Address**  
**Street**  
**46 Oak Lane**  
**City**  
**Staten Island**  
**State/Territory**  
**New York**  
**Zip**  
**10312**

Contact Phone Number **(347) 612-5549**

## Applicant Education

BA/BS From **Cornell University**  
 Date of BA/BS **May 2021**  
 JD/LLB From **Georgetown University Law Center**  
[https://www.nalplawschools.org/employer\\_profile?FormID=961](https://www.nalplawschools.org/employer_profile?FormID=961)  
 Date of JD/LLB **May 1, 2024**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **Georgetown Environmental Law Review**  
 Moot Court **No**  
 Experience

## Bar Admission

## Prior Judicial Experience

Judicial Internships/  
 Externships **Yes**

Post-graduate Judicial  
Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Heinzerling, Lisa  
heinzerl@law.georgetown.edu  
Tobia, Kevin  
kt744@georgetown.edu  
Donohue, Laura  
lkdonohue@law.georgetown.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Danny Shokry  
46 Oak Lane  
Staten Island, NY 10312  
ds1768@georgetown.edu | (347) 612-5549

June 12, 2023

The Honorable Judge Jamar Walker  
U.S. District Court for the Eastern District of Virginia  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker:

I am a second-year law student at Georgetown University Law Center. I am writing to apply for a clerkship in your chambers for the 2024 term, or any term thereafter.

My transcript, resume, writing sample, and letters of recommendation are enclosed. My recommenders are:

Professor Laura Donohue  
(202) 662-9455  
lkdonohue@law.georgetown.edu

Professor Liza Heinzerling  
(202) 662-9115  
heinzerl@georgetown.edu

Professor Kevin Tobia  
(202) 662-9771  
Kevin.Tobia@georgetown.edu

Please let me know if I can provide any additional information. I can be reached at (347) 612-5549 or ds1768@georgetown.edu. Thank you for considering my application.

Sincerely,



Danny Shokry

# Danny Shokry

2337 18<sup>th</sup> St NW, Washington, D.C. 20009  
ds1768@georgetown.edu | (347) 612-5549

## EDUCATION

### Georgetown University Law Center

*Juris Doctorate*

Washington, D.C.  
Expected May 2024

GPA: 3.77

Honors: C. Keefe Hurley Scholar; Endowed Opportunity Scholar; Dean's List, 2021-2022

Activities: OutLaw (Secretary); Middle Eastern North African Law Students Associations (Treasurer); Georgetown Environmental Law Review (Staff Editor and Executive Editor); RISE Scholar; Constitutional Law I RISE Tutor; Criminal Justice Tutor; Law Library Reference Desk Clerk

### Cornell University, College of Arts and Sciences

*Bachelor of Arts* in Biological Sciences, with a concentration in Neurobiology and Behavior

Ithaca, NY  
May 2021

Minors: Environmental & Sustainability; Law and Society

Honors: Dean's List, 2018 - 2020; American Mock Trial Association All-American Witness, 2018

Activities: Mock Trial (Captain and E-Board), 2017 - 2021; Cornell Arts & Sciences Ambassador and Peer Advisor, 2019 - 2021; Undergraduate Teaching Assistant, 2021; Student Hospitality Worker, 2017 - 2020

## EXPERIENCE

### Selendy Gay Elsberg

*Summer Associate*

Washington, D.C.  
May 2023 – Present

### Georgetown University Law Center

*Graduate Research Assistant for Professor Tobia*

Washington, D.C.  
Jan 2022 – Dec 2022

- Identify and label metalanguage (language that describes or analyzes other language) and respective cues in Supreme Court opinion to create a data bank for artificial intelligence training
- Collected data about current Supreme Court Justices' language in past scholarship about what constitutes "a reasonable person"

### United States District Court for the District of Columbia

*Judicial Extern for Judge Christopher R. Cooper*

Washington, D.C.  
Aug 2022 – Nov 2022

- Researched and drafted bench memoranda in response to multiple cases, including settlement disputes and FSIA cases
- Provided legal research and editing support to law clerks and judge preparing bench memoranda and draft opinions

### Beck Redden

*Summer Associate*

Houston, TX  
May 2022 – June 2022

- Managed a contract dispute case under attorney supervision, including researching applicable statutes and case law, deciding venue, drafting a complaint, and communicating with the client
- Observed depositions and discussed effective strategies with attorneys

### Cornell Defenders

*Undergraduate Intern*

Ithaca, NY  
June 2020 – Aug 2020

- Provided legal research to public defenders representing indigent defendants in criminal and family law matters

## INTERESTS

American Sign Language; small boat sailing; bouldering

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Danny Shokry  
GUID: 821601746

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center  
Juris Doctor  
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2021 -----							
LAWJ	001	91	Civil Procedure	4.00	A-	14.68	
			Kevin Arlyck				
LAWJ	004	11	Constitutional Law I: The Federal System	3.00	A	12.00	
			Laura Donohue				
LAWJ	005	13	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Kristen Tiscione				
LAWJ	008	91	Torts	4.00	A-	14.68	
			Girardeau Spann				
			EHrs QHrs QPts GPA				
Current			11.00 11.00 41.36 3.76				
Cumulative			11.00 11.00 41.36 3.76				
----- Spring 2022 -----							
LAWJ	002	12	Contracts	4.00	A-	14.68	
			Nakita Cuttino				
LAWJ	003	12	Criminal Justice	4.00	A-	14.68	
			Paul Butler				
LAWJ	005	13	Legal Practice: Writing and Analysis	4.00	B+	13.32	
			Kristen Tiscione				
LAWJ	007	91	Property	4.00	A-	14.68	
			Michael Gottesman				
LAWJ	1349	50	Administrative Law	3.00	A-	11.01	
			Lisa Heinzerling				
LAWJ	611	06	World Health Assembly Simulation: Negotiation Regarding Climate Change Impacts on Health	1.00	P	0.00	
			Kathryn Gottschalk				
Dean's List 2021-2022							
			EHrs QHrs QPts GPA				
Current			20.00 19.00 68.37 3.60				
Annual			31.00 30.00 109.73 3.66				
Cumulative			31.00 30.00 109.73 3.66				

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2022 -----							
LAWJ	1491	01	Externship I Seminar (J.D. Externship Program)		NG		
			Sandeep Prasanna				
LAWJ	1491	119	~Seminar	1.00	A	4.00	
			Sandeep Prasanna				
LAWJ	1491	121	~Fieldwork 3cr	3.00	P	0.00	
			Sandeep Prasanna				
LAWJ	165	07	Evidence	4.00	A	16.00	
			Gerald Fisher				
LAWJ	1663	05	The Federal Courts and the World Seminar: History, Developments, and Problems	2.00	A-	7.34	
			Kevin Arlyck				
LAWJ	1711	05	Separation of Powers Seminar: Hot Topics in Scholarship	3.00	A	12.00	
			Josh Chafetz				
LAWJ	317	05	Negotiations Seminar	3.00	A	12.00	
			Kondi Kleinman				
In Progress:							
			EHrs QHrs QPts GPA				
Current			16.00 13.00 51.34 3.95				
Cumulative			47.00 43.00 161.07 3.75				
----- Spring 2023 -----							
LAWJ	146	08	Environmental Law	3.00	A-	11.01	
LAWJ	178	05	Federal Courts and the Federal System	3.00	A-	11.01	
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties	4.00	A	16.00	
LAWJ	351	08	Trial Practice	2.00	A	8.00	
----- Transcript Totals -----							
			EHrs QHrs QPts GPA				
Current			12.00 12.00 46.02 3.84				
Annual			28.00 25.00 97.36 3.89				
Cumulative			59.00 55.00 207.09 3.77				
----- End of Juris Doctor Record -----							

Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Danny Shokry for a judicial clerkship with you.

I am lucky enough to have had Danny as a student in two of my courses so far: Administrative Law (taught as a first-year elective) and Environmental Law. Through discussions in the classroom and in office hours, I feel I've come to know Danny well. He is a wonderful person, with an infectious cheerful disposition despite the seriousness with which he takes his studies. In both of my classes, Danny was an indispensable part of the classroom dialogue, weighing in with a healthy skepticism about agencies' and courts' approaches to the legal questions we were studying and continually bringing in relevant insights from adjacent areas of law. Danny earned an A- on the final exams in both courses, having written well-constructed exams that made excellent use of a large range of the topics we had covered. From Danny's law school transcript, which reports an impressive overall GPA of 3.75 through the fall semester of 2022, one can see that Danny's fine performance in my classes is of a piece with his other academic work.

Danny has also flourished outside of the classroom. He is an editor of the *Georgetown Environmental Law Review*, a tutor in Criminal Justice, the Treasurer of the Middle Eastern North African Law Students Associations, and the secretary of OutLaw. He has externed for Judge Christopher Cooper of the federal district court in D.C. During his undergraduate years at Cornell, Danny studied biological sciences with a focus on neurobiology and behavior, and paired his studies with laboratory research on memory formation. Danny is thus an atypical law student insofar as he is as comfortable with scientific and quantitative concepts as he is with legal argument. As a member of Cornell's mock trial team, Danny was ranked at nationals as the best individual participant in the whole competition. Danny is, in short, a person of wide-ranging interests and multiple talents.

Danny's achievements are all the more remarkable when one knows something about his personal background. Danny is a RISE Scholar at Georgetown. RISE is a program created to serve law students who come from backgrounds that have historically been underrepresented in the legal academy and profession. Danny comes from a family of Coptic Christians from Egypt. After his father was kidnapped and tortured on account of his religious views, the family fled to the United States to escape persecution. Danny was 7 years old and spoke little English. While taking English as a Second Language for six years after coming to this country, Danny fell in love with math and science, eventually pivoting to an interest in law as a consequence of reading and appreciating the Supreme Court's pathbreaking opinion in *Obergefell v. Hodges*. Rereading Danny's exams from my courses for the purpose of writing this letter, I marveled at the distance – both geographical and metaphorical – Danny has traveled in a few short years. I believe your chambers would benefit greatly from his presence.

I recommend Danny Shokry to you without reservation. I hope these comments are helpful to you in considering his application. Please let me know if I can be of any further assistance.

Sincerely,

Lisa Heinzerling  
Justice William J. Brennan, Jr. Professor of Law

Lisa Heinzerling - heinzerl@law.georgetown.edu

Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write this letter on behalf of Danny Shokry, Georgetown Law (expected 2024), who has applied to your chambers for a clerkship. I am an Associate Professor at Georgetown Law, where I teach and write in statutory and constitutional interpretation, torts, and empirical legal studies. I have taught hundreds of students, as an instructor at Oxford and Georgetown Law and as an assistant-in-instruction or teaching fellow at NYU Law, UCLA Law, and Yale Law. Among all of these impressive students, Danny stands out as an extremely impressive, promising, and well-rounded student. I offer the most enthusiastic support of his clerkship application to your chambers.

I first met Danny during a lunch program for “OutLaw,” Georgetown Law’s LGBTQIA+ law student association. OutLaw invites Georgetown Law professors to lunch with groups of students. Danny made a great impression from the start. He was one of the few students who submitted a thoughtful question in advance of the lunch program, and he was quick to follow the substantive part of my lunch talk, about statutory interpretation. At the lunch, he was friendly and professional.

Danny is pro-active. Shortly after the lunch event, he emailed me to ask whether I am recruiting RAs. I prefer to hire 2L and 3L students, but Danny had an impressive background, even among strong Georgetown Law students: His undergraduate grades are excellent, he worked as a science research assistant, and previously interned for a group of public defenders.

His interview confirmed my high expectations. Danny understood my projects immediately and asked insightful questions about the research. We had an impressively wide-ranging discussion about legal issues from Danny’s classes and the real world. In short, Danny stood out as a bright, eager, curious, and dedicated student. He was an easy choice to hire as an RA.

As an RA, Danny took on several big projects, and I was impressed by his ability to juggle so much. One of his projects involved reading a large number of Supreme Court opinions and “coding”/annotating them for various legal and linguistic properties. The project was coordinated between myself and a Georgetown Linguistics professor, with the primary goal of studying judicial use of “meta-language” (that is, language about other language, like “the meaning of the clause is...”). Several RAs were involved in the coding. Danny was a great coder. He worked quickly *and* accurately. Danny also helped me with a project related to “the reasonable reader.” Here too, Danny read a large number of Supreme Court opinions, distilling features of the “reasonable” and “ordinary” reader into an extremely clear and helpful spreadsheet.

Danny also took initiative. I was (too) busy during part of the time in which Danny was working, and Danny helped keep several of my projects run on time. Danny never overstepped his role, but he was admirably attentive to the project’s needs, helpfully moving into a leadership role and picking up (my) slack. Danny has a wonderful combination of hard and soft skills, including legal ability, acumen, and diligence. He would be an ideal member of any team, and I have no doubt he would flourish as a clerk.

Although I have not had Danny as a student in my class, I have reviewed his transcript and a writing sample. His 1L grades are very good. The Georgetown 1L curve is steep and consistent A- grades indicate strong performance. His 2L grades have taken an even further upward trajectory. Academically, Danny is a very impressive student.

Danny’s writing is also excellent. His research memos were clear, well-reasoned, and to the point. In writing this letter, I reviewed Danny’s legal memo for his legal practice course. That memo strikes me as very good legal writing.

Danny has clearly flourished academically, in his undergraduate work and throughout his time at Georgetown. He has also flourished in his extracurriculars, serving in leadership roles for OutLaw (LGBTQIA+ law students), the Middle Eastern North African Law Students Association, and the Georgetown Environmental Law Review.

He has also gained practical legal experience, as a judicial extern for Judge Christopher R. Cooper, U.S. District Court for the District of Columbia, and as a summer associate at Beck Redden. In discussing his work experiences with Danny, it was clear that Danny’s supervisors saw his ability. In some of these experiences, Danny was given significant responsibility and the employers’ feedback was enthusiastically positive.

Beyond Danny’s legal talent, work ethic, leadership ability, and writing skills, he is also a delightful person. Danny was well-liked and respected by his fellow research assistants. He is friendly and thoughtful. He is also a team-player, who is polite, articulate, thoughtful, professional, and modest. In every setting in which I’ve known Danny, he brings a positive outlook and collaborative spirit. He is also one of the most eager and curious students with whom I’ve worked. He would make for a wonderful clerk: I can easily imagine Danny diving into a broad range of legal work with excitement and dedication.

Kevin Tobia - kt744@georgetown.edu

In sum, Danny has the rare mix of legal intellect, diligence, collegiality, and an ability to work fast and get the details right. I predict that Danny would be an excellent law clerk, and I would be happy to discuss his experience further at any time. Thank you for considering his candidacy.

Sincerely,

Kevin Tobia, J.D., Ph.D. (Philosophy)  
Associate Professor of Law

Kevin Tobia - kt744@georgetown.edu

Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing in strong support of Mr. Danny Shokry, who is applying for a clerkship in your chambers. I first got to know Danny when I taught him Constitutional Law I during his 1L autumn. We have continued to meet regularly as he has progressed through law school. He is a truly remarkable person, whose background has deeply shaped why he has gone into the law. He brings an important perspective that would be invaluable in chambers. He also is a stellar law student. I recommend him without reservation.

Danny's background is remarkable. He was seven years old when his family suddenly had to leave Cairo, Egypt to seek asylum in the United States. His family is Coptic, a Christian ethnoreligious group which faces severe persecution in Egypt. Although he had frequently heard derogatory remarks made to him and his family, and, because of bombings targeting Copts in Cairo, had been afraid when they went to Christmas and other days of worship, he was not aware at the time the extent to which his family had been targeted. He found out, years later, that his Grandmother had awakened to a bomb on her balcony. Danny's father, in turn, who was a Christian pastor and had travelled to different communities across Egypt, had been arrested and tortured because his teachings had been heard by a prominent government official's daughter. The family fled the country and arrived in the United States. Last year, for the first time, his father showed him his asylum "application" – a piece of paper his father had written in broken English, which recounted his experience and plead for refuge within America for his family.

When Danny first arrived in New York, he was overwhelmed. He did not speak much English and for the next six years was enrolled in ESL. In the meantime, it was through math that he found a connection to others – a common language that could give him a sense of belonging. Math provided a gateway then to science, prompting him in eighth grade to apply to the Science Institute – a specialized math and science school in New York. While he was there, he worked on his English skills in particular – leaning into his weaknesses to try to learn how better to communicate. About a year after he joined his high school mock trial team, the Supreme Court ruled in *Obergefell v. Hodges* – a case particularly influential for Danny at the time, in light of his understanding that he was gay, as well as his fear of telling his family, which is extremely religious.

These two experiences – the contrast between Egypt and the United States in his ability to practice his religion without fear of persecution, as well as the importance of the judicial system in protecting his rights and those of others like him – instilled in him a deep commitment to the rule of law.

When he entered Cornell, Danny found himself at a crossroads. While he still loved science, he wanted to explore more the side of oral advocacy. He joined Cornell's mock trial team, where he made it to nationals and placed in the top ten teams in the United States. He individually was ranked as the best participant in the country. His sophomore year, he joined the executive board for the mock trial team and proceeded to take a number of undergraduate law classes taught at the law school. He was work study in college, and he went on to balance his demanding academic schedule, neuroscience research, and working in the dining hall and later the cafes on campus. Despite the impact of COVID in his junior year, Danny worked with Cornell Defenders, a program that partnered with Cornell Law to provide undergraduate and law students an opportunity to work for Ithaca's public defenders.

At Georgetown Law, Danny's love of, and commitment to, the law is evident. He excelled in my course. Although ConLaw I is only 3 credits, the material I use in many ways reflects a 4-credit course. To help the students prepare for constructing and responding to originalist and purposive constitutional arguments, I begin with the Magna Carta and the beheading of Charles I before moving to the Glorious Revolution and the English Bill of Rights as precursors to the Virginia Declaration of Rights and the Declaration of Independence. The students then read the Articles of Confederation and look at where the framework failed, before considering the debates at the Constitutional Convention, the subsequent ratification of the U.S. Constitution by the states, and the adoption of the Bill of Rights.

At that point, the course begins to look more like a conventional ConLaw course, as we turn to *Marbury v. Madison*. We study separation of powers and federalism, with the discussion ranging from the 10th Amendment to sovereign immunity. Students consider the enumerated powers in Article I(8), with particular emphasis on tax and spend, the commerce clause, and the necessary and proper clause, before turning to Art. II, executive direction and control, and Art. I/Art. II war powers. We then look political question doctrine and the role of the courts. At the end, the course returns to the question of whether the structure was sufficient to safeguard rights, with emphasis on the First Amendment.

In brief, the students have to absorb a tremendous amount of material and gain breadth and depth.

Mr. Shokry came every day, prepared, and was willing to take on arguments with which he both agreed and disagreed, to probe

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the strengths and weaknesses of precedential, purposive, historical, textualist, structuralist, and policy-based arguments. I could call all students every class and encourage debate, tracking their participation. In 23 classes, he participated in the debate approximately 40 times – he also came to about a quarter of my office hours during the term, to ensure that he understood the materials.

Danny earned an A on the final – one of only a few students in the class to do so. My class is far from the only place where he has excelled. He currently maintains a 3.75 GPA at Georgetown Law.

Danny went on to tutor students in my ConLaw I class this year, as part of the support provided to students in the RISE program, which is designed to help students who come from non-traditional backgrounds – such as first generation college students and ethnic or racial minorities.

Danny has assumed numerous leadership roles at Georgetown Law. He is the Secretary of OutLaw, the Treasurer of the Middle Eastern North African Law Students Association, and both a Staff Editor and Executive Editor of the *Georgetown Environmental Law Review*.

The reason Danny wants to clerk is to continue to hone his research and writing skills and to learn as much as he can about the judicial process to help him to become an in-court advocate. He is eager to see many different types of approaches to advocacy in the courtroom. And he is keen to learn more about how judges approach the law.

As an immigrant from a low socioeconomic background, Danny would benefit tremendously from the mentorship that is part of the clerkship opportunity.

Danny's experiences in life, and the ways he has risen to meet the challenges he has faced, are remarkable. His legal abilities are extremely strong. He is also humble, kind, and just a lovely person. He would be a joy to have as part of a clerkship cohort. I recommend him without reservation.

Please feel free to reach out to me at 202-531-4433 if you have any further questions about his candidacy.

Yours sincerely,

Laura K. Donohue, J.D., Ph.D. (Cantab.)  
Scott K. Ginsburg Professor of Law and  
National Security Professor of Law

Laura Donohue - lkdonohue@law.georgetown.edu

Danny Shokry  
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June 12, 2023

The attached writing sample is a bench memorandum that I drafted as an assignment when I was a judicial intern at the United States District Court for the District of Columbia in Judge Christopher R. Cooper's chambers. The assignment was to read through the factual record, identify the issues, conduct research, and give guidance on how the Court should rule in a FOIA case where the Plaintiff believes the parties had reached a valid settlement agreement, but the Defendant did not. I performed all the research and writing myself. Although I received verbal feedback from a senior writing fellow at Georgetown University Law Center's Writing Center, this writing sample is substantially my writing.

All identifying facts and names have been redacted for confidentiality purposes. I am submitting the attached writing sample with the permission of Judge Cooper's chambers.

### Statement of the Issue Presented for Review

Did the parties reach a valid, enforceable settlement agreement where defense counsel, a DOJ employee, had authorization from the Government Agency, but not from DOJ supervisors, and only Plaintiff signed the agreement?

### Conclusion

The parties likely did not have a valid settlement agreement. First, the Defense did not express the requisite intent to be bound by the agreement. The agreement's express terms required both parties' signatures to be binding. The Defendant never signed the agreement, and therefore, it was not binding.

Second, defense counsel lacked the authority to bind the federal government to the settlement agreement. Defense counsel's representations that Defendant was willing to accept to accept the settle agreement do not bind the government because apparent authority is inapplicable against the federal government. In addition, as an AUSA, defense counsel did not have sufficient authority on his own. Defense counsel also did not have actual authority from DOJ supervisors as is required by DOJ policies. Similarly, the Government Agency's authorization was insufficient because authority to accept settlement agreements rests with the DOJ, not the Government Agency.

### Statement of the Case

#### I. Factual Background

Plaintiff Environmental Group is a nonprofit based out of a Western state. Compl. ¶ XX. On [date], Plaintiff submitted a written request to Defendant seeking records regarding a land exchange. Compl. ¶ XX. Defendant is the federal agency that maintains the land exchange records that Plaintiff was seeking. Compl. ¶ XX. Plaintiff's request was denied by Defendant without any formal determination or advising Plaintiff of appeal rights. Compl. ¶ XX. Defendant did not consider the [date] request a proper FOIA request. Ans. ¶ XX; ECF XX at XX.

#### a. [Date] FOIA Request

On [date], Plaintiff submitted a FOIA request for the land exchange records. Compl. ¶ XX. On [date], Defendant confirmed it had received the FOIA request. Compl. ¶ XX. On [date], Defendant provided its first interim response in the form of records released in full. Compl. ¶ XX. On [date], Defendant informed Plaintiff it had identified additional relevant pages and was going to release approximately half, claiming FOIA Exemptions 3, 5, and 6 for the rest. Compl. ¶ XX; ECF XX at X.

On [date], Plaintiff reached out to Defendant's employee seeking a specific record. Compl. ¶ XX. Defendant's employee informed Plaintiff that she did not have nor will she receive the records Plaintiff was seeking, and that Defendant would only receive an analyzed version of the record ("TARP"). Compl. ¶ XX. Defendant's employee also told Plaintiff that she had not sent them the TARP for the land exchange in the first response, despite having received it on [date]. Compl. ¶¶ XX-XX

#### **b. [Date] FOIA Request**

On [date],<sup>1</sup> Plaintiff sent an email to Defendant's employee seeking the TARP. Compl. ¶ XX. On [date], Plaintiff received a letter from Defendant's FOIA office stating that Defendant had considered the email as a second FOIA request and confirmed receiving it. Compl. ¶ XX. Defendant also provided an entirely redacted copy of the TARP and claimed FOIA Exemption 5. Compl. ¶ XX. On [date], Plaintiff requested an unredacted version. Compl. ¶ XX. Approximately two weeks later, Defendant rejected Plaintiff's request based on FOIA Exemption 5 and informed Plaintiff on its right to appeal. Compl. ¶ XX.

The deadline to respond to this FOIA request was [date].<sup>2</sup> Compl. ¶ XX.

#### **c. [Date] FOIA Request**

On [date], Plaintiff submitted another FOIA request seeking the actual record that the TARP analyzed. Compl. ¶ XX. On [date], Defendant confirmed it had received the FOIA request, identified relevant records, but was withholding them under FOIA Exemptions 5 and 6. Compl. ¶ XX.

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<sup>1</sup> Date typo. Actual text says "[Date]"

<sup>2</sup> It is unclear why this was included in the complaint since the agency responded by [date].

**d. [Date] Appeal for the [date] and [date] FOIA Requests**

On [date], Plaintiff submitted an administrative appeal for its [date] and [date] FOIA requests. Compl. ¶ XX. On [date], Defendant confirmed receiving the appeal. Compl. ¶ XX. Defendant claims that this appeal did not include the [date] FOIA request, and even if it did, the deadline to appeal that FOIA was [date], and therefore it was too late. Ans. ¶ XX; ECF XX at X.

On [date], the statutory deadline for Defendant's response to the appeal had passed. Compl. ¶ XX. On [date] and [date], Plaintiff inquired into the status of their appeal, which was still processing. Compl. ¶ XX-XX. On [date], Defendant had finished its review of the appeal, releasing some of the previously withheld records and withholding others under Exemptions 5 and 6. Compl. ¶ XX.

**e. [Date] Appeal for the [date] FOIA Request**

On [date], Defendant filed an appeal for the [date] FOIA request. Compl. ¶ XX. On [date], Defendant had confirmed it was processing this appeal. Compl. ¶ XX. Plaintiff has not yet received a final determination of this appeal. Compl. ¶ XX. On [date], Defendant released over 1,000 pages and withheld fifty pages under Exemptions 5 and 6 in response to both appeals. ECF XX at X.

**II. Procedural Posture**

Plaintiff filed a complaint on [date]. Compl. at XX. Defendant filed an answer on [date], asserting three defenses: Plaintiff failed to exhaust administrative remedies by failing to file a timely appeal, Defendant complied with FOIA's requirements, and Defendant did not have to produce all the records as they properly fell within FOIA exemptions. Ans. at XX-XX. On [date], Defendant filed a motion for summary judgment asserting the defenses identified in the answer. ECF XX.

On [date], Plaintiff reached out to Defendant to negotiate a settlement agreement. ECF XX at X. Plaintiff and Defendant negotiated in good faith for over three months. ECF XX at X-X; ECF XX at X. Plaintiff, with Defendant's consent, requested extending its deadline to respond to Plaintiff's summary judgment motion three times. ECF XX at X. The Court extended the deadline to [date] and encouraged both parties to finalize the settlement agreement within 30

days. ECF XX at X. The Court also said that if no settlement is reached within 30 days, then deadlines for the summary judgment briefing would be due. ECF XX at X-X.

On [date], defense counsel represented to Plaintiff that the Government Agency had approved the terms of the settlement agreement. ECF XX at X; ECF XX-XX at X. The parties continued to make procedural and non-substantive edits to the settlement agreement. ECF XX at X. On [date], defense counsel represented to Plaintiff that his supervisor had approved the settlement agreement, pending one change. ECF XX-X at X. The same day, Plaintiff consented to the change and signed the settlement agreement. ECF XX-X at X. Defense counsel, however, never signed the settlement agreement. ECF XX at XX. The settlement agreement would have fully resolved Plaintiff's claims, leaving only attorney's fees to be decided on later. ECF XX at X.

Later that day, defense counsel called Plaintiff and informed Plaintiff that Defense's supervisor required changes be made. ECF XX at XX. The parties attempted to assuage the supervisor's requirements to no avail. ECF XX at XX. Two days later, defense counsel relayed that their supervisor required the settlement agreement to be rewritten and raised other substantive edits to Plaintiff. ECF XX-X at X.

On [date], the Court held a status conference between the two parties, but no agreement was reached. ECF XX at XX. The parties agreed to convene four days later. ECF XX at XX. However, later that same day, defense counsel told Plaintiff that the proposal was withdrawn, and Plaintiff should file its motion. ECF XX-X at X. The Plaintiff filed a motion seeking to enforce the [date] settlement agreement. ECF XX at X. Defendant filed a motion opposing the enforcement and Plaintiff filed another motion in response. ECF XX-XX.

### Legal Standard

"It is well established that federal district courts have the authority to enforce settlement agreements entered into by litigants in cases pending before them." Samra v. Shaheen Bus. and Inv. Group, Inc., 355 F. Supp. 2d 483, 493 (D.D.C. 2005) (citing Autera v. Robinson, 419 F.2d 1197, 1200 (D.C. Cir. 1969)). The party moving to enforce a settlement agreement bears the burden of proving that the parties formed a binding agreement by clear and convincing evidence. Blackstone v. Brink, 63 F.Supp.3d 68, 76 (D.D.C. 2014). If there is a genuine dispute "about

whether the parties have entered into a binding settlement, the district court must hold an evidentiary hearing that includes the opportunity for cross-examination.” Samra, 355 F. Supp. 2d at 493 (quoting United States v. Mahoney, 247 F.3d 279, 285 (D.C. Cir. 2001)). The hearing’s purpose is to allow the court to make credibility determinations and allow factual issues to be adequately explored. Id. (citing Autera, 419 F.2d at 1202).

“[W]hether parties have reached a valid settlement is a question of contract law.” Id. at 494 (citing Mahoney, 247 F.3d at 285). Contract formation is controlled by the law of the state. Makins v. District of Columbia, 277 F.3d 544, 547-48 (D.C. Cir. 2002). Plaintiff contends that D.C. law controls here, ECF XX at XX, and Defendant not contest Plaintiff and cites D.C. law. ECF XX at XX; ECF XX at X.

## **Argument**

### **I. The Parties Likely Did Not Enter Into an Enforceable Agreement**

Under D.C. law, an enforceable contract exists when (1) there is an agreement to all the material terms, (2) both parties express an intent to be bound, and (3) parties have the authority to enter into a contract. Makins, 277 F.3d at 547-48. Defendant that there was an agreement to all the material terms,<sup>3</sup> but contests an expression of an intent to be bound and authority to enter into a binding argument. ECF XX. The parties likely did not express an intent to be bound and defense counsel likely lacked the authority to enter into the settlement agreement, and therefore, an enforceable contract does not exist.

#### **a. Defendant Likely Did Not Express an Intent to Be Bound by the Settlement Agreement**

Defendant likely did not express an intent to be bound by the settlement agreement. Neither party contests Plaintiff’s expression of its intent. Thus, only Defendant’s intent is at issue. Courts can examine the written agreement itself to determine if there was an intent to be bound. Ekedahl v. CORESTAFF, Inc., 183 F.3d 855, 858 (D.C. Cir. 1999) (applying D.C. law).

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<sup>3</sup> Plaintiff argues that since there was a “final version” ready to be signed, the parties had an agreement to all the terms contained therein. ECF XX at XX. Plaintiff argues that the agreement would have set forth the terms and conditions of the parties’ compromise to the FOIA searches conducted by Defendant, the FOIA exemptions applicability, and Defendant’s policies. ECF XX at XX-XX. Plaintiff argues that these compromises were bargained for by the parties, and thus are legally sufficient consideration. ECF XX at XX.

Id. Although a signature is the clearest evidence of an intent to be bound, it is not essential. Hood v. District of Columbia, 211 F. Supp. 2d 176, 180 (D.D.C. 2002) (applying D.C. law). However, an agreement’s terms may require a signature to bind the parties. Carter v. Bank of Am., 845 F. Supp. 2d 140, 144-45 (D.D.C. 2012) (applying D.C. law) (“no contract will be formed unless and until defendants sign the Loan Modification Agreement.”); see also Osseiran v. Int’l Fin. Corp., No. 06-336, 2010 WL 11636217, at \*3 (D.D.C. June 28, 2010) (applying D.C. law) (“only the document as executed by [the parties] will contain the terms that bind them. Until the document is executed by [the parties], neither [party] intends to be bound.”); see also Whittaker v. United States, No. 19-199, 2021 WL 2913626, at \*8 (D.D.C. July 12, 2021) (applying D.C. law) (finding that where the agreement’s terms did not require execution, an agreement was still binding despite a lack of a signature.).

Paragraph X of the [date] agreement stated “[t]he parties also agree that this agreement may be executed in counterparts and is *effective on the date by which both parties have executed this agreement.*” ECF XX-X at X (emphasis added). The proposed settlement agreement unambiguously required the parties to do more than just agree to the agreement’s terms – it required execution. The only way that the agreement contemplates execution is through signing the agreement, and it was never signed. ECF XX-X at X. Because the agreement was never signed, it was never executed, and therefore, no enforceable contract exists.

Plaintiff may argue that defense counsel’s conduct can show that the parties had agreed to all the terms contained within the [date] settlement and were “merely awaiting ‘memorialization of their agreement in a more formal document.’” United House of Prayer for All People v. Therrien Waddell, Inc., 112 A.3d 330, 342 (D.C. 2015) (citing Vacold LLC v. Cerami, 545 F.3d 114, 123 (2d Cir. 2008)). Defense counsel had told Plaintiff that he required supervisory approval on multiple occasions, had acquired supervisory approval, pending one change, and would send it over to the Court once Plaintiff signed . ECF XX-X at X; ECF XX-X at X; ECF XX-XX at X-X; ECF XX-X at X. The court can inquire into the parties’ action at the time of contract formation only if the written settlement agreement is ambiguous.<sup>4</sup> Given the plain and

<sup>4</sup> Ambiguity or plain meaning of the contract are questions of law. Segar v. Mukasey, 508 F.3d 16, 22 (D.C. Cir. 2007). Therefore, determination of the ambiguity or plain meaning does not require a hearing. See Samra, 355 F. Supp. 2d at 493.

unambiguous language of the settlement agreement, the court should not consider the party's conduct.

**b. Defense Counsel Likely Lacked the Authority to Bind Defendant to the Settlement Agreement**

Defense counsel likely could not have bound Defendant to the settlement agreement because he lacked the authority to bind the federal government. An agent may bind his principal only if he has actual or apparent authority. Makins v. District of Columbia, 861 A.2d 590, 593 (D.C. 2004). Because there was no actual or apparent authority, the settlement agreement was likely made without authority to bind the Defendant. Id.

**i. Apparent authority does not apply against the government.**

Apparent authority exists when a third party believes that an agent has authority to bind the principal. Id. at 594 (citing Sigal Construction Corp. v. Stanbury, 586 A.2d 1204, 1219 (D.C. 1991)). Apparent authority, however, does not apply against the government. E.g., Fed. Crop Ins. v. Merrill, 332 U.S. 380, 384 (1947) (“Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority.”); Perkins v. District of Columbia, 146 A.3d 80, 85 (D.C. 2016). Defense counsel incorrectly relies on Burton v. Adm’r, Gen. Serv. Admin. to prove that apparent authority applies here. In Burton, the AUSA reached a settlement agreement with Burton after receiving the USFS’s blessing. Burton, No. 89-2338, 1992 WL 300970, \*4 (D.D.C. July 10, 1992). The court held that the “[AUSA]’s reliance on the representations of agency counsel as to the agency’s position” are not unreasonable and that the “[AUSA] cannot have been expected to second-guess [agency employee]’s assurances that the agency agreed with the settlement terms [the AUSA] offered to plaintiff.” Id. (emphasis added). Burton speaks to representations made by the the represented agency to the AUSA and the AUSA’s reliance on such representations, not representations made by an AUSA or DOJ employee. Id. Here, however, Plaintiff maintains apparent authority for statements made by defense counsel to Plaintiff. ECF XX at XX-XX. Thus, Burton is inapplicable and apparent authority

Plaintiff also argues that even if there is a general exception, Defendant has not shown that it does not apply to FOIA defendants who agree to a non-monetary settlement. However, the Supreme Court in Fed. Crop. Ins. extremely broad language's cuts against Defendant's claim: "*Whatever* the form in which the Government functions, *anyone* entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." 332 U.S. at 384 (emphasis added). Therefore, apparent authority is insufficient to render the settlement agreement valid.<sup>5</sup>

**ii. Defense counsel likely did not have actual authority because he did not have supervisory approval to agree to the settlement agreement and the Government Agency's approval is insufficient.**

Plaintiff claims that defense counsel had actual authority since he was authorized by the Government Agency and by DOJ supervisors to accept the settlement agreement. ECF XX at X. Defendant does not contest that defense counsel had authorization from the Government Agency but argues that defense counsel was never authorized to accept the settlement by DOJ supervisors, and therefore, the agreement is not binding.<sup>6</sup> ECF XX at X.

Defense counsel himself knew and clearly represented to Plaintiff that he did not have the authority to enter into a settlement agreement purely on his own authority. ECF XX-X at XX, X, XX; see [Supervisor 1] Decl. ¶ X. Courts often look to statutes, regulations, rules, or policies to determine authority. Burton, 1992 WL 300970, at \*4 (looking to internal policy, but finding that it was not controlling because it was not written); Perkins, 146 A.3d at 85; see also Davis & Assoc., Inc. v. District of Columbia, 501 F. Supp. 2d 77, 81 (D.D.C. 2007) (applying D.C. law); see also Bank of Am., N.A. v. District of Columbia, 80 A.3d 650, 670 (D.C. 2013). DOJ had a written guideline that requires a supervisor approving a settlement agreement to submit a referral memorandum. U.S. Dep't of Just., Just. Manual § 4-3.320; [Supervisor 2] Decl. ¶ X; [Supervisor 1] Decl. ¶ X. Defense counsel's supervisor stated that she never approved the settlement, citing her lack of compliance with § 4-3.320 as evidence. [Supervisor 2] Decl. ¶ X-X. The failure to comply with department guidelines likely means that defense counsel's supervisors did not

<sup>5</sup> Defendant also claims that even if apparent authority did apply against the government, Plaintiff has not met the requirement of a showing of detrimental reliance. The Court does not need to reach the merits of this argument because apparent authority does not apply against the federal government.

<sup>6</sup> Defendant also argues that Plaintiff has failed to raise actual authority in its opening brief, and therefore, forfeits this argument. ECF XX at X n.X (citing Al-Tamimi v. Adelson, 916 F.3d 1, 6 (D.C. Cir. 2019)).

confer proper authority to accept the settlement agreement, nor did she attempt to do so. [Supervisor 2] Decl. ¶ X (“I conveyed that I approved the general idea of settling as to liability now and attorney’s fees and costs later, so that the parties could resolve liability issues before the filing deadline. I did not, however, approve the specific draft agreement that [defense counsel] had attached to the email. Later that same day, after having reviewed the attached settlement agreement, I had numerous concerns with it and told [defense counsel] that it needed substantial revision and that I did not authorize him to execute it.”).<sup>7</sup> Thus, defense counsel likely lacked authorization to accept the settlement agreement by his supervisor.

Government Agency’s authorization is also likely insufficient. DOJ has “plenary power” in settling cases. See Burton, 1992 WL 300970, at \*3 (citing 5 U.S.C. § 901 (“As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.”)). While “a client’s right to accept or reject a settlement offer is absolute,” by referring the case to DOJ, the Government Agency has transferred its settlement authority to DOJ. See In re Hager, 812 A.2d 904, 919 (D.C. 2002); cf. Vill. of Kaktovik v. Watt, 689 F.2d 222, 234-35 n.13 (D.C. Cir. 1982) (Greene, H., concurring) (“The Department of Justice has consistently referred to the Department of the Interior as its ‘client’ ... the Justice Department’s client is the United States.”). Therefore, the Government Agency’s authorization is likely insufficient to give defense counsel actual authority to accept the settlement agreement.

<sup>7</sup> Plaintiff does not seem to be contesting these facts, perhaps due to a lack of access. ECF XX at X. However, if a factual dispute does arise, a hearing with opportunity for cross examination is required. Samra, 355 F. Supp. 2d at 493.

Applicant Details

First Name	Nathan
Last Name	Siegel
Citizenship Status	U. S. Citizen
Email Address	<a href="mailto:siegel2024@lawnet.ucla.edu">siegel2024@lawnet.ucla.edu</a>
Address	<div><div>Address</div><div>Street</div><div>13541 Chaco Ct.</div><div>City</div><div>San Diego</div><div>State/Territory</div><div>California</div><div>Zip</div><div>92129</div><div>Country</div><div>United States</div></div>
Contact Phone Number	8588633039

Applicant Education

BA/BS From	University of California-Los Angeles
Date of BA/BS	June 2016
JD/LLB From	University of California at Los Angeles (UCLA) Law School
	<a href="http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=90503&amp;yr=2011">http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=90503&amp;yr=2011</a>
Date of JD/LLB	May 10, 2024
Class Rank	I am not ranked
Law Review/Journal	Yes
Journal(s)	UCLA Law Review UCLA Journal of Law and Technology
Moot Court Experience	Yes
Moot Court Name(s)	UCLA Internal Moot Court Competition UCLA Skye Donald 1L Moot Court Competition

**Bar Admission**

**Prior Judicial Experience**

Judicial  
Internships/        **No**  
Externships  
Post-graduate  
Judicial Law        **No**  
Clerk

**Specialized Work Experience**

**Recommenders**

Petherbridge, Lee  
lee.petherbridge@lls.edu  
(213) 736-8194  
Spillenger, Clyde  
spilleng@law.ucla.edu  
(310) 825-7470  
Babbe, David  
babbe@law.ucla.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Nathan Siegel**

13541 Chaco Ct. | San Diego, CA 92129 | (858) 863-3039 | siegel2024@lawnet.ucla.edu

---

June 12, 2023

The Honorable Jamar K. Walker  
United States District Court for the Eastern District of Virginia  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510

Re: Judicial Clerkship Application

Dear Judge Walker:

I am a rising third-year law student at UCLA School of Law, graduating in 2024. I am writing to apply for a position as a term law clerk in your chambers beginning in August of 2024.

I want to clerk in a trial court because I believe that it will best prepare me for my desired career in litigation while allowing me to experience a wide variety of cases and legal work. As a former electrical engineer who is interested in all aspects and types of litigation and the law in general, I have a wide range of academic and professional interests, and I enjoy learning about new topics. Because of this, I look forward to gaining experience in many areas of litigation and developing the skills necessary to be a well-rounded litigator. I believe that clerking in your chambers will allow me to gain this desired experience while also helping me sharpen my legal writing skills, which I have already begun to strengthen through my involvement in Law Review, in multiple board positions for UCLA's Journal of Law and Technology, as a Research Assistant for UCLA's Institute for Technology, Law and Policy, and through authoring a Comment that is scheduled to be published in UCLA's Law Review in 2024.

In sum, I believe I would be an asset to your chambers. Enclosed for your review please find my resume, transcript, writing sample, as well as letters of recommendation from Professor Clyde Spillenger, Professor Lee Petherbridge, and Professor David Babbe. The writing sample is a moot court brief that I wrote that won Best Petitioner Brief. Thank you for your time and consideration. I look forward to hearing back from you.

Respectfully,

*Nathan Siegel*

Nathan Siegel

Enclosures

Nathan Siegel

13541 Chaco Ct. | San Diego, CA 92129 | (858) 863-3039 | siegel2024@lawnet.ucla.edu

EDUCATION

UCLA School of Law, Los Angeles, CA

J.D. expected May 2024 | GPA: 3.58

Honors: Moot Court Honors (for high performance in internal competitions)

Activities: Law Review, Associate Editor; Journal of Law and Technology, Co-Editor-In-Chief, Co-Executive Editor; IP Law Association, Member; American Constitution Society, Member; El Centro Clinic, Member/Volunteer

University of California, Los Angeles, Los Angeles, CA

B.S., Electrical Engineering, June 2016 | GPA: 3.33

Awards: Mr. and Mrs. Benton Bejach Undergraduate Scholarship (2013, 2014, 2015)

Qualcomm Scholarship (2013, 2014)

Activities: Institute of Electrical and Electronics Engineers UCLA Chapter, Team Lead; Engineering Society of UCLA, Mentor; Bruin Partners, Volunteer

PROFESSIONAL EXPERIENCE

Fish & Richardson P.C., San Diego, CA

May 2022 – July 2022; May 2023 – July 2023

Summer Associate

- Worked on a variety of patent litigation projects including drafting legal memoranda, searching for prior art, charting patents for invalidity analysis, and analysing grounds for infringement
- Worked on a pro bono case and contributed to the firm’s page for tracking Federal Circuit decisions

UCLA Institute of Technology, Law, and Policy, Los Angeles, CA

December 2022 – May 2023

Research Assistant

- Conducted legal research and wrote policy proposals regarding the intersection of law and technology

UCLA Law School’s Veteran’s Justice Clinic, Los Angeles, CA

January 2023 – May 2023

Student Attorney

- Conducted client intake interviews; counselled client and developed case strategy
- Conducted legal research and drafted legal memoranda regarding character of discharge upgrade appeals

Texas Instruments, Dallas, TX / San Diego, CA

Summer 2015; August 2016 – June 2021

Application Verification and Validation Engineer, Applications Engineer

- Led projects and cross-functional initiatives across many different teams; communicated with customers
- Wrote application notes, technical reference manuals, design guides, and blog posts
- Completed tests and designs on strict product-gating deadlines and provided feedback on test status

Applications Engineering Intern, Summer 2015

- Worked with customers to investigate hardware and software issues and developed sample applications

Qualcomm, San Diego, CA

Summer 2014

Engineering Intern

- Interfaced with software and hardware teams to design tests and produce detailed test documentation

PUBLICATIONS

“Women’s Suffrage, Black Suffrage, and Lessons for Today: A Side-By-Side Comparison of Both Suffrage Movements and the Lessons They Provide for Current Suffrage Movements,” 71 UCLA L. Rev. (forthcoming 2024).

INTERESTS

Enjoy basketball, volleyball, disc golf, reading, and volunteer coaching

NAME: SIEGEL, NATHAN S  
UCLA ID: 804170400  
BIRTHDATE: 11/04/XXXX

UNIVERSITY OF CALIFORNIA, LOS ANGELES  
LAW ACADEMIC TRANSCRIPT

PAGE 1 OF 1

PROGRAM OF STUDY

ADMIT DATE: 08/23/2021

SCHOOL OF LAW

MAJOR: LAW

SPECIALIZING IN MEDIA, ENTERTAINMENT, TECHNOLOGY, AND SPORTS

	ATM	PSD	PTS	GPA
CUMULATIVE TOTAL	62.0	62.0	200.4	3.579
TOTAL COMPLETED UNITS	62.0			

DEGREES | CERTIFICATES AWARDED  
NONE AWARDED

GRADUATE DEGREE PROGRESS  
SAW COMPLETED IN LAW 565, 22F

PREVIOUS DEGREES  
BACHELOR OF SCIENCE AWARDED JUNE 10, 2016 FROM UCLA  
IN ELECTRICAL ENGINEERING

CALIFORNIA RESIDENCE STATUS: NONRESIDENT

FALL SEMESTER 2021

MAJOR: LAW

CONTRACTS	LAW 100	4.0	13.2	B+	
INTRO LEGAL ANALYSIS	LAW 101	1.0	0.0	P	
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP	
MULTIPLE TERM - IN PROGRESS					
TORTS	LAW 140	4.0	13.2	B+	
CIVIL PROCEDURE	LAW 145	4.0	14.8	A-	
		ATM	PSD	PTS	GPA
TERM TOTAL		13.0	13.0	41.2	3.433

SPRING SEMESTER 2022

LGL RSCH & WRITING	LAW 108B	5.0	18.5	A-	
END OF MULTIPLE TERM COURSE					
CRIMINAL LAW	LAW 120	4.0	13.2	B+	
PROPERTY	LAW 130	4.0	14.8	A-	
CONSTITUT LAW I	LAW 148	4.0	12.0	B	
INTL COMPARATIVE LW	LAW 165	1.0	0.0	P	
		<u>ATM</u>	<u>PSD</u>	<u>PTS</u>	<u>GPA</u>
	TERM TOTAL	18.0	18.0	58.5	3.441

FALL SEMESTER 2022

CONSTITUTIONAL LAW II	LAW 201	4.0	14.8	A-	
PATENT LAW	LAW 306	3.0	12.0	A	
TELECOM REGULATION	LAW 437	2.0	8.0	A	
AMER CONSTL HISTORY	LAW 565	3.0	12.0	A	
PRETRIAL CIVIL LIT	LAW 700	4.0	0.0	P	
		<u>ATM</u>	<u>PSD</u>	<u>PTS</u>	<u>GPA</u>
TERM TOTAL		16.0	16.0	46.8	3.900

SPRING SEMESTER 2023


EVIDENCE	LAW 211	4.0	13.2	B+	
FEDERAL COURTS	LAW 212	3.0	9.9	B+	
TRADEMARK LAW	LAW 274	4.0	14.8	A-	
VETERNS JUSTCE CLIN	LAW 730	4.0	16.0	A	
		<u>ATM</u>	<u>PSD</u>	<u>PTS</u>	<u>GPA</u>
TERM TOTAL		15.0	15.0	53.9	3.593

LAW TOTALS

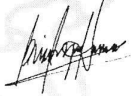
	ATM	PSD	PTS	GPA
PASS/UNSATISFACTORY TOTAL	6.0	6.0	N/A	N/A
GRADED TOTAL	56.0	56.0	N/A	N/A

END OF RECORD  
NO ENTRIES BELOW THIS LINE

THIS INFORMATION HAS BEEN RELEASED IN ACCORDANCE WITH THE FEDERAL FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND CANNOT BE FURTHER DISCLOSED WITHOUT THE PRIOR WRITTEN CONSENT OF THE STUDENT.



**Authentication**  
This official transcript is printed on security paper with a blue fading background, the Seal of the UCLA Office of the Registrar, and the signature of the Senior Director of Academic Services and Registrar, Brian Hansen.



# UCLA SCHOOL OF LAW TRANSCRIPT LEGEND

UCLA School of Law  
Records Office  
Box 951476  
Los Angeles, CA 90095-1476

(310) 825 – 2025  
[records@law.ucla.edu](mailto:records@law.ucla.edu)  
<http://www.law.ucla.edu>

The following information is offered to assist in the evaluation of this student's academic record.

**COURSE NUMBERS:** (as of 2010) First year and MLS courses are numbered 100-199, advanced courses 200-499, seminars 500-699, experiential courses 700-799, externships 800-899, short courses 900-999. (1978-2010) First year courses are numbered 100-199, advanced courses 200-399, clinical courses 400-449, externships 450 – 499, and seminars 500 – 599.

**CREDITS:** Beginning 1978, credits are semester units, prior to that time, credits were quarter units.

## EXPLANATION OF CODES FOUND TO THE RIGHT OF A COURSE ON OLDER TRANSCRIPTS

CODE	EXPLANATION
PU	Courses graded on a pass/Unsatisfactory/ No Credit basis
T1	First term of a multiple term course
2T	Final term of a multiple term course, unit total for all terms combined
TU	Final term of a multiple course graded on a Pass/Unsatisfactory/No Credit basis
UT	Final term of a multiple course graded on a Pass/Unsatisfactory/No Credit basis, unit total for all terms combined.

**GRADE POINT AVERAGE (GPA) CALCULATION:** The GPA is calculated by dividing grade points by graded units attempted. Transfer credits are not included in the UCLA GPA.

## EXPLANATION OF GRADING SYSTEM 1995 – Present

Grade & Grade Points	JD, LLM and SJD Student Definitions	MLS Student Definitions
A+ = 4.3	Extraordinary performance	Extraordinary performance
A = 4.0 A- = 3.7	Excellent performance	Superior Achievement
B+ = 3.3 B = 3.0 B- = 2.7	Good performance	Satisfactorily demonstrated potentiality for professional achievement in field of study
C+ = 2.3 C = 2.0 C- = 1.7	Satisfactory performance	Passed the course but did not do work indicative of potentiality for professional achievement in field of study
D+ = 1.3 D = 1.0	Unsatisfactory performance	Grade unavailable for MLS students
F	Lack of understanding of major aspects of the course No credit awarded	Fail
P	Pass (equivalent of C- and above) Not calculated into the GPA	Satisfactory (achievement at grade B level or better)
U	Unsatisfactory (equivalent to grades D+ and D)	Grade unavailable for MLS students
NC	No credit (equivalent to a grade of F) No unit credit awarded	No credit (equivalent to a grade of F) No unit credit awarded
LI	Incomplete, course work still in progress	Grade unavailable for MLS students
I	Grade unavailable for JD, LLM and SJD students	Incomplete, course work still in progress
IP	In Progress, multiple term course, grade given upon completion	In Progress, multiple term course, grade given upon completion
W	Withdrew from course	Withdrew from course
DR	Deferred Report	Deferred Report

**RANK:** Until 1970, the School of Law ranked its graduates according to their final, cumulative grade point averages. Since that time, it has been the policy of the School of Law not to rank its student body. The only exceptions are:

- 1971 – 2015 - at the end of each academic year the top 10 students in the second- and third-year classes were ranked.
- 2016 – Present - at the end of each academic year the top 12 students in each class are ranked.
- 2009 – Present - the top ten percent of each LLM graduating class are ranked (by percentile, rather than numerically).
- The top ten percent of each JD graduating class is invited to join the Order of the Coif (a National Honorary Scholastic Society.)

## HONORS:

2008 - Present - Masin Scholars – top 12 students at the end of the first year, prior to optional grade changes.

2013 – Present - Masin Gold Award (formerly Dean's Awards) – highest grade in each course graded on a curve. Masin Silver Award (formerly Runner-up Dean's Award) - second highest grade in each large course (40 or more students) graded on a curve.

**ACCREDITATION:** American Bar Association, 1952

**CERTIFICATION:** The Seal of the University of California, Los Angeles, Registrar's Office and the Registrar's signature.

**FERPA NOTICE:** This educational record is subject to the Federal Family Educational Rights and Privacy Act (FERPA) of 1974, and subsequent amendments. This educational record is furnished for official use only and may not be released to, or accessed by, outside agencies or third parties without the written consent of the student identified by this record.

## Previous Grading Scales

GRADE	DEFINITION
100-85	A or excellent performance (grades of 95 and above demonstrate extraordinary performance)
84-75	B or good performance
74-65	C or satisfactory performance
64-55	D or unsatisfactory performance
54-50	F or lack of understanding of major aspects of the course No unit credit awarded
P	Pass (Equivalent to grades of 65 and above) Not calculated in the GPA
U = 62	Unsatisfactory (Equivalent to grades of 64-55)
NC = 50	No Credit (Equivalent to grades of 54-50) No unit credit awarded
IP	In Progress, multiple term course, grade given upon completion
W	Withdrew from course

GRADE	DEFINITION
H (high)	A or excellent performance
HP (high pass)	B or good performance
P (pass)	C or satisfactory performance
I (inadequate)	D or unsatisfactory performance
NC (no credit)	F or lack of understanding of major aspects of the course. No unit credit awarded
CR (credit)	Pass, unit credit awarded for the course
NR (in progress)	In progress, multiple term course, grade given upon completion
W	Withdrew from course

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

CLYDE SPILLENGER  
PROFESSOR OF LAW



UCLA

SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW  
BOX 951476  
LOS ANGELES, CALIFORNIA 90095-1476  
Phone: (310) 825-7470  
email: spilleng@law.ucla.edu

June 2, 2023

Dear Judge:

I am writing this letter in support of the application by **Nathan Siegel**, Class of 2024 at UCLA School of Law, for a clerkship in your chambers beginning Fall of 2024. I am Professor of Law at UCLA, where I have taught since 1992. I recommend Nathan very highly. He will make an excellent lawyer, and he'll be a very proficient law clerk.

Nathan was a student in my upper-level seminar entitled "Topics in American Constitutional History" during Fall 2022. This seminar featured a mix of primary and secondary readings, mostly on topics that are covered lightly if at all in the first-year Constitutional Law class. The emphasis was on close readings and guided discussions, with students required to post online responses to the week's readings on several occasions during the semester. In addition, Nathan chose to write his required Supervised Analytic Writing paper as part of this seminar. His paper, "Women's Suffrage, Black Suffrage, and Lessons for Today" was first-rate. His comparison of the dynamics underlying the movements for Black Suffrage and Women's Suffrage, respectively, was sophisticated and well-informed. His paper achieved what I seek from my legal history students in their research: an understanding of historical issues that illuminates contemporary controversies. In addition, Nathan's online responses to the seminar's weekly readings were excellent. In class, he was pointed and astute in discussion. His interventions were modest and polite in tone, but always nuanced and persuasive.

Nathan is thoughtful, affable, respectful. He's been a pleasure to work with and has struck me as being mature and responsible.

As you can see, I recommend Nathan Siegel enthusiastically. Please let me know if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink that reads "Clyde Spillenger". The signature is written in a cursive, flowing style.

Clyde Spillenger  
Professor of Law

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

CLYDE SPILLENGER  
PROFESSOR OF LAW



UCLA

SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW  
BOX 951476  
LOS ANGELES, CALIFORNIA 90095-1476  
Phone: (310) 825-7470  
email: spilleng@law.ucla.edu

June 2, 2023

Dear Judge:

I am writing this letter in support of the application by **Nathan Siegel**, Class of 2024 at UCLA School of Law, for a clerkship in your chambers beginning Fall of 2024. I am Professor of Law at UCLA, where I have taught since 1992. I recommend Nathan very highly. He will make an excellent lawyer, and he'll be a very proficient law clerk.

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Nathan is thoughtful, affable, respectful. He's been a pleasure to work with and has struck me as being mature and responsible.

As you can see, I recommend Nathan Siegel enthusiastically. Please let me know if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink that reads "Clyde Spillenger". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Clyde Spillenger  
Professor of Law



DAVID BABBE  
LECTURER IN LAW

SCHOOL OF LAW  
BOX 951476  
LOS ANGELES, CALIFORNIA 90095-1476  
Phone: (310) 206-1339  
Email: Babbe@law.ucla.edu

May 31, 2023

Dear Judge:

Re: Recommendation of Nathan Siegel for Judicial Clerkship

I am writing to recommend Nathan Siegel for employment as a judicial clerk. I worked very closely with Nathan as a student in my Pretrial Civil Litigation course. In that course, Nathan drafted a research memo; drafted interrogatories, requests for admissions and requests for production of documents; took fact, corporate designee, and expert depositions; and drafted and argued a motion to compel and argued a motion to dismiss. As a result, I have had the opportunity to carefully observe and evaluate Nathan's research and writing skills, his oral advocacy skills, his work ethic, and his ability to work effectively with his colleagues. Based on these observations, I strongly recommend Nathan for a judicial clerkship.

Although I am currently a teacher at UCLA, I make my comments about Nathan from the perspective of a practicing litigator, not an academic. Before joining UCLA's faculty, I spent twenty-nine years in private practice specializing in complex business litigation, the last twenty years as a partner with Morrison & Foerster. During that time, I worked with dozens of young lawyers, and have developed a strong sense of the qualities in law students and young lawyers that are predictive of success in practice.

Nathan has all the qualities that will make him a very effective judicial clerk. He has very strong research and analytical skills. The research memo and the motion to compel that he drafted consistently reflected thoughtful and insightful factual and legal analysis. Nathan is also a very good writer. His writing is well-organized, logical, clear, and direct. In addition, his work product always demonstrated the highest level of preparation and attention to detail. One of the points that I try to impress upon my students is that preparation is key to being a successful lawyer. Nathan did an outstanding job of preparing for each of his litigation simulations. For example, in each of the depositions that he took, he not only identified all of the information that he needed to get from the deponent, but had carefully thought through what would be the most effective questioning techniques to use to obtain that information. Similarly, in the two motions that he argued, Nathan was not only fully in command of the relevant facts and legal authorities, but did an outstanding job of anticipating the court's questions and presenting his arguments in a very persuasive manner.

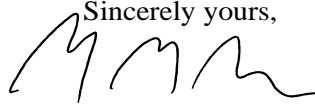
On a personal level, Nathan is a treat to work with. He is a very responsible individual and is mature beyond his years. He takes complete responsibility and ownership of his work, and has a very strong work ethic. He is the kind of person that, when I was in practice, I always wanted to have on my litigation team. If you give Nathan an assignment, you can have absolute confidence that the work product will be excellent, that it will be done on time and that it will exceed your expectations. Nathan is also a genuinely nice person who was well-liked by his fellow students.

May 31, 2023

Page 2

For all these reasons, I believe that Nathan will be an outstanding judicial clerk and a strong addition to your chambers. Please feel free to give me a call or send me an e-mail if I can provide any additional information. You can reach me at (310) 994-6986 or [babbe@law.ucla.edu](mailto:babbe@law.ucla.edu).

Sincerely yours,

A handwritten signature in black ink, appearing to read 'David Babbe', with a stylized, cursive script.

David Babbe

## **Nathan Siegel**

13541 Chaco Ct. | San Diego, CA 92129 | (858) 863-3039 | siegel2024@lawnet.ucla.edu

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### **Writing Sample**

The attached writing sample is a brief submitted for the UCLA Moot Court Fall Competition. The case involved a Fourteenth Amendment Equal Protection issue regarding an affirmative action policy and a First Amendment issue stemming from the termination of a public university lecturer.

The questions presented for the competition were:

- 1) Whether Respondent's admissions policy, which gives preferential weight to male applicants, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?
- 2) Whether Respondent violated Petitioner's right to freedom of expression under the First Amendment to the United States Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment?

I represented the petitioner, Stephanie Jones. Please note that for the First Amendment question competitors were asked only to address whether *Pickering* balancing should be applied, and not to actually apply it. This memorandum is completely self-edited and constitutes original work product.

### Introduction

Stephanie Jones seeks to invalidate the admissions policy (the “Policy”) of Westsylvania State University (“WSU”)’s medical school (WSU Medical). The Policy discriminates based on gender by intentionally accepting men with lower qualifications than women. After her application was rejected under the Policy, Jones began working for WSU undergrad as a lecturer. She was fired from this position for expressing her personal viewpoints about gender-based affirmative action and the Policy. The discriminatory Policy violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and WSU’s firing of Jones violated her right to freedom of expression under the First Amendment to the U.S. Constitution.

First, the Policy violates the First Amendment because it is not sufficiently narrowly tailored to further a compelling governmental interest as is required of such an inherently suspect classification. Even if this strict scrutiny were not applied, the Policy would still not satisfy the minimum level of scrutiny that has been applied to gender-based discrimination cases.

Second, Jones’s speech was addressed to matters of public concern and was not otherwise barred from First Amendment protection by the *Garcetti* requirement. Though Jones’s speech is not barred from protection by the *Garcetti* requirement, it should not even apply in such cases where the speaker was exercising her academic and scholastic freedom. Because her speech was directed to a matter of public concern, *Pickering* balancing should be applied.

### Statement of the Case

WSU is a competitive public university that is the flagship school of the Westsylvania seven-campus state system. (R at 3). Both the university and WSU Medical have competitive admissions processes. (R at 4).

WSU Medical has an unbalanced gender ratio, with more than 60 percent of its students being women. (R at 4). Recently, two thirds of applications received by WSU Medical were from women. (R at 4). Of the 1,300 students admitted, 800 were women. (R at 4). Generally, WSU Medical's graduating class consists of approximately 55 percent women. (R at 4). Similar trends are seen nationwide in medical schools, but this is a relatively recent development.<sup>1</sup> (R at 4). Today, 49% of medical schools have a majority-female student body. (R at 4).

WSU Medical has long argued that gender diversity is critical to its status and prestige, and its primary concern is that a growing gender disparity will negatively impact its ranking. (R at 4). This is because it believes that: (1) most medical students view a diverse, equitable balance of men and women as crucial to a well-rounded academic experience; and (2) generally, once a school is regarded as "one-sided," fewer students will find the school to be an attractive option. (R at 4). WSU Medical cannot, however, confirm this speculation with any empirical data. (R at 4). To fix this perceived problem, WSU Medical aims to admit more males than females because males tend to accept offers at a lower rate. (R at 4). WSU Medical also argues that men and women bring different lived experiences and perspectives to the classroom, which enhance the educational experience while helping to break down stereotypes. (R at 5).

Since 2010, WSU Medical's Admissions Committee has made efforts to ameliorate gender disparities, including: (1) visiting every undergraduate institution within a 250-mile radius at least once every quarter; (2) increasing the school's recruiting budget by 30 percent to fund email marketing campaigns aimed at male applicants as well as in-person receptions and

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<sup>1</sup> In 1985, 31 percent of students enrolled in American medical schools were women. In 1976, that number was only 27 percent, and in 1968, it was 10 percent.

seminars at the Medical School; (3) offering the first 1,000 males who apply to the Medical School fee waivers; (4) hosting male-only application workshops; (5) creating diversity scholarships for admitted male students from underrepresented backgrounds; (6) sending WSU Medical apparel to the first 1,500 male candidates who apply to the Medical School; and (7) expanding outreach by advertising to prospective candidates on Facebook and Instagram using an algorithm intended to target males in their final years as undergraduates. (R at 5). Despite this, a gender gap in GPA and test scores persists, which has led WSU Medical to believe that it should accept more male students, despite their lower credentials. (R at 5). In April, 2018, WSU Medical instituted the Policy to reduce its gender gap. (R at 5).

Stephanie Jones applied to WSU Medical in January 2019 with an MCAT score above the national median and an undergraduate GPA that put her in the top 20 percent of her class. (R at 6). She also had a masters degree and a significant amount of work and volunteer experience. (R at 6). After her application was rejected, she used the Freedom of Information Act to obtain data on the incoming class that showed that many admitted males had GPAs and test scores lower than hers. (R at 6). All admitted females met or exceeded Jones' credentials. (R at 6).

In addition to grades and test scores, WSU Medical considers many other factors in its admissions process. (R at 6). These include its "Plus Factors," which have in recent years given more weight to gender. (R at 7). In 2020, WSU Medical appointed a committee of medical professors that found that WSU Medical's admissions team "presses its thumb on the scale" in favor of males when they have the same credentials as females. (R at 7). It also discovered that, since 2017, WSU Medical set a numerical goal for males to admit. (R at 7).

After Jones was rejected, she began teaching at WSU undergrad as a part-time lecturer. (R at 7). The Gender Studies department created a class on gender and medicine exclusively for

Jones. (R at 8). Jones also taught a large introductory survey class on gender issues. (R at 8). During the Fall 2021 term, Jones frequently called on male students to defend WSU Medical’s affirmative action policy and made jokes such as chiding male students for failing to “buck the affirmative action stereotype.” (R at 8). One students’ complaint about her actions led WSU’s Dean of Diversity, Inclusion, and Equity to demand that she change her behavior. (R at 8).

WSU did not require Jones to publish papers or participate in research, though she attended two conferences (one at WSU) in October 2022. (R at 8-9). Jones presented papers at these conferences that criticized gender-based affirmative action and the Policy. (R at 9).

In November, WSU’s student government hosted an Anti-Racism rally. (R at 10). Jones, at the urging of WSU faculty and student government leaders, performed a slam poetry verse that criticized affirmative action. (R at 10). Her performance went viral, causing WSU to lose a third of its alumni donations (from male alumni). (R at 10). Later that month, WSU fired Jones. (R at 10)

### Argument

#### **I. The Policy is Not Sufficiently Narrowly Tailored to Further a Compelling Governmental Interest as is Required of Such an Inherently Suspect Classification**

Government programs that create classifications based on immutable characteristics that have “no relation to ability to perform or contribute to society” are inherently suspect. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., plurality). When the state imposes these classifications, such as those based on gender, its “burden of justification is demanding.” *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see, e.g., Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (finding that “the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an exceedingly persuasive justification for the challenged classification”) (internal quotations omitted).

### **A. Strict Scrutiny Should be Applied to WSU Medical’s Discriminatory Gender-Based Admissions Policy**

As set forth by Justice Brennan in *Frontiero*, there is “implicit support” for the determination that gender classifications are “inherently suspect and must therefore be subjected to close judicial scrutiny.” 411 U.S. at 682 (plurality). Strict scrutiny is thus the correct test for gender discrimination because “statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.” *Id.* at 686-7. As was determined in *Frontiero*, sex “is an immutable characteristic determined solely by the accident of birth” that “frequently bears no relation to ability to perform or contribute to society.” *Id.* The Policy is one such example of gender having no relation to ability to perform. There is no suggestion that it is intended to artificially reduce the percentage of women in WSU Medical’s class because of their inability to perform in the medical field. In fact, if anything, the Policy is reducing how qualified the average student is by admitting less qualified mail applicants because of their gender.

Though Justice Brennan’s opinion in *Frontiero* was only a plurality opinion, Justice Powell and the two other justices signing onto his opinion concurred in the judgment and only refrained from signing onto Justice Brennan’s opinion because they felt it was “unnecessary for the Court in [that] case to characterize sex as a suspect classification.” 411 U.S. at 691-2 (Powell, J., concurring). They did not foreclose the possibility of gender being considered a suspect classification in the future. They further justified their unwillingness to apply strict scrutiny by pointing out that the Equal Rights Amendment had at the time just been submitted for ratification by the states. *Id.* at 692. They were waiting for the will of the people to be asserted and did not want the Court to step in “prematurely and unnecessarily” to “assume a decisional

responsibility” when the democratic process was debating the proposed Amendment. *Id.* The present case differs importantly in that the Equal Rights Amendment has now been awaiting ratification for almost fifty years. This is certainly more than enough time for the democratic process to have played out such that it is appropriate for the Court to now step in to hold gender to be a suspect classification.

Furthermore, the correct test for affirmative action cases is strict scrutiny, as established by Justice Powell’s plurality opinion in *Bakke* and affirmed in *Grutter*. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 289-90 (1978) (“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of color. If both are not accorded the same protection, then it is not equal.”); *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003). The same reasoning can be applied to gender. If the guarantee of equal protection means one thing when applied to an individual and something else when applied to a person of a different gender, then it is not equal. In this affirmative action case, as was the case in *Grutter*, strict scrutiny should be applied.

**B. WSU Medical Has Failed to Show that Gender Diversity is a Compelling State Interest**

When strict scrutiny is applied, the party defending a discriminatory policy based on a suspect classification bears the burden of showing that the policy furthers a compelling governmental interest. *See, e.g., id.* at 326 (holding that classifications reviewed under strict scrutiny are constitutional only if they “further compelling governmental interests”). In *Grutter*, the Court found that diversity was a compelling interest in the university affirmative action context, but it focused only on diversity of race, not gender. *Id.* at 328; *see also Fisher v. Univ. of Texas at Austin II*, 579 U.S. 365, 381 (2016) (holding that “a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from

student body diversity”). Because the Court has not explicitly identified gender diversity in university admissions as a compelling interest, the facts of the present case must show that gender diversity was being sought as the basis for a compelling governmental interest.

In *Grutter*, the Court justified its finding that the law school in that case had a compelling interest in attaining a diverse student body by deferring to the school’s judgment that “diversity will, in fact, yield educational benefits.” *Grutter*, 539 U.S. at 328. WSU Medical’s primary concern, however, is that a growing gender disparity will negatively impact its ranking. (R at 4) Though it is understandable that a school would be concerned about this loss of prestige, this is not the compelling interest of yielding educational benefits that the Court has used to support racial diversity in affirmative action cases. Furthermore, WSU Medical has no empirical data to support its concerns. (R at 4). Though WSU also argues that men and women bring different lived experiences and perspectives to the classroom, and thus combine to enhance the educational experience, it again lacks the evidence and findings regarding this secondary concern necessary to show that gender diversity in this case is a sufficiently compelling interest. (R at 5).

Furthermore, there is also no compelling interest here in using gender diversity as a basis to rectify past discrimination. Though WSU Medical has more female than male students and 54.5 percent of the total number of medical students across the nation were women in 2019, the percentage of women enrolled in American medical schools has historically been well below 50 percent. (R at 4). Furthermore, a slight majority of medical schools across the country have majority-male student bodies. (R at 4). Thus, if there is in fact any historical gender disparity that requires correction by affirmative action, it is that of women being underrepresented, not men. WSU thus has not compelling state interest that the Policy is meant to further.

**C. The Policy is not Sufficiently Narrowly Tailored to Achieve WSU Medical's Interest of Gender Diversity**

Even if there is a compelling state interest to justify a discriminatory admissions policy, the policy must be necessary to further the interest and must be narrowly tailored to achieve it. *Bakke*, 438 U.S. at 306 (finding that the use of a suspect classification must be “necessary...to the accomplishment of its purpose of the safeguarding of its interest”). “Quota systems” are not allowed. *Grutter*, 539 U.S. at 328.

The Policy makes use of a quota, as understood by the Court, as part of the admissions process. Though WSU Medical makes use of various criteria, such as its “Plus Factors,” a committee appointed by WSU Medical found that between 2017 and 2020 the school set a “numerical goal” for males to admit. (R at 7). Though not a quota by name, the Court has found a “goal” to be equally guilty of impermissible line-drawing based on gender. *Bakke*, 438 U.S. at 289 (“Whether this limitation is described as a quota or goal, it is a line drawn on the basis of race and ethnic status”).

Narrow tailoring also requires “serious, good faith consideration” of workable nondiscriminatory “alternatives that will achieve the diversity the university seeks.” *Grutter*, 539 U.S. at 339. Though WSU Medical’s Admissions Committee had previously devoted time and resources to ameliorating gender disparities, there are still other nondiscriminatory ways that the school could have tried to attract more male students such as advertising in male-dominated media markets or reaching out to alumni. Furthermore, because male applicants who are accepted to WSU Medical enroll at a lower rate than women, WSU has not shown how the Policy will increase diversity. Without addressing why the average male is less likely to enroll, WSU cannot know if accepting more (less qualified) males will increase enrollment.

Even if it were determined that strict scrutiny should not apply to a gender-based admissions policy, the Policy is still unconstitutional. Regarding gender-based classifications, the Court has required at least that “the discriminatory means employed are substantially related to the achievement” of the governmental interest. *United States v. Virginia*, 518 U.S. at 533. The above-described failure of WSU Medical to show how its accepting less-qualified male applicants will improve diversity when it is unknown why males enroll at a lower rate renders the Policy not “substantially related” to its interest in improving gender diversity.

## **II. Jones’ Speech Was Addressed to Matters of Public Concern and Was Not Otherwise Barred from First Amendment Protection by the *Garcetti* Requirement**

Public employees, including teachers, enjoy a measure of First Amendment protection from termination due to their speech. *Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968) (holding that it “has been unequivocally rejected in numerous prior decisions of this Court” that “teachers may constitutionally be compelled to relinquish their First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work”). Such employee speech is protected if it does not occur “pursuant to” their “official duties,” *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006), and it relates to matters of “public concern.” *Pickering*, 391 U.S. at 568.

### **A. The *Garcetti* Requirement that Speech Not Occur “Pursuant to” an Employee’s “Official Duties” Does Not Apply to Jones’ Speech Because It Was Made Pursuant to Her Scholarship and Exercise of Academic Freedom**

Though *Garcetti* set forth a general rule regarding government employees’ speech, it expressly declined to address whether its analysis would apply “to a case involving speech related to scholarship or teaching.” *Garcetti*, 547 U.S. at 425. Furthermore, this Court has previously held that “the First Amendment protects the free-speech rights of professors when they are teaching.” *Meriwether v. Hartop*, 992 F. 3d 492, 505 (6th Cir. 2021). Several Circuit

Courts have persuasively reasoned that *Garcetti* does not apply to professors at public universities “at least when engaged in core academic functions, such as teaching and scholarship.” *Id.*; *see, e.g., Demers v. Austin*, 746 F. 3d 402, 412 (9th Cir. 2014) (“We conclude that *Garcetti* does not – indeed, consistent with the First Amendment, cannot – apply to teaching and academic writing that are performed pursuant to the official duties of a teacher and professor”); *Adams v. Trs. Of the Univ. of N.C. Wilmington*, 640 F. 3d 550 (4th Cir. 2011) (“Applying *Garcetti* to the academic work of a public university faculty member...could place beyond the reach of First Amendment protection many forms of public speech...a professor engaged in during his employment. That does not appear to be what *Garcetti* intended...”).

To protect the academic freedom and scholarship that the courts have found to demand First Amendment protection, the *Garcetti* requirement must not be applied to Jones’ speech directed to students in the classes that she taught. The same is true for her academic writing and the speeches she gave in October 2022, which fall under her academic scholarship. Because Jones was encouraged to deliver her slam poetry verse at the Anti-Racism rally by WSU faculty and student government leaders, and her topic was related to her scholarship and the subjects of the classes she taught, this speech should avoid the *Garcetti* requirement as well.

**B. Even if the *Garcetti* Requirement Applies Here, the Speech for Which Jones was Disciplined Did Not Occur “Pursuant to” Her “Official Duties”**

When *Garcetti* applies, it requires that “public employees [not] make statements pursuant to their official duties.” *Garcetti*, 547 U.S. at 421. This is because “[w]hen a public employee speaks pursuant to employment responsibilities, ...there is no relevant analogue to speech by citizens who are not government employees.” *Id.* at 424.

Jones was fired shortly after she criticized WSU’s gender-based affirmative action policies at two academic conferences and her performance at the Anti-Racism rally went “viral”

on social media. (R at 9-10). Though she was encouraged to perform at the Anti-Racism rally by WSU faculty and student government leaders, her performance was not in any way part of her required official duties. This is further supported by the fact that WSU's student government president did not introduce Jones as an employee of WSU. (R at 10). This was an entirely voluntary performance where she shared her personal scholarly viewpoints. Though Jones availed herself of travel support and stipends from WSU to cover research costs, neither this research, nor her subsequent attendance of two academic conferences, were part of her required duties as a lecturer at WSU. (R at 8-9). To the contrary, she was hired to teach undergraduate courses, and a new class was even created exclusively for her. (R at 8). Furthermore, because the Anti-Racism rally featured non-WSU speakers and the conferences were attended by people outside of WSU, Jones' speech had a relevant private citizen analogue because she voiced her "grievance through channels available to citizens generally." *Weintraub v. Bd. Of Educ.*, 593 F.3d 196, 204 (2nd Cir. 2010).

Though her speech as part of teaching her was pursuant to her official duties, this was not the speech for which she was fired. Because the speech for which she was disciplined was not pursuant to her official employment duties, Jones' speech survives the *Garcetti* requirement.

### **C. Jones' Speech Addressed Matters of Public Concern**

"[A] teacher's exercise of [her] right to speak on issues of public importance may not furnish the basis for [her] dismissal from public employment." *Pickering*, 391 U.S. at 574. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48.

In *Connick*, a District Attorney informed an Assistant District Attorney that she was being fired for refusing to accept a transfer, but the “facts showed that the questionnaire was the real reason for her termination.” *Id.* at 142. Similarly, though WSU expressed their unhappiness with several of Jones’ actions, she was only fired after her performance at the Anti-Racism rally went viral and the university lost around a third of its alumni donation. (R at 10). Therefore, it is this speech that needs to be addressed to see if it involves issues of public concern.

Jones’ poem at the rally addressed affirmative action and gender bias against women, which are some of the most polarizing issues in this country, and just as concerning to the public as statements about presidential policies and the attempted assassination of the president. *See Rankin v. McPherson*, 483 U.S. 378, 386 (1987). When a public university uses a discriminatory policy to judge the applications of members of the public, this is a public issue. This also applies to Jones’ speech at the two academic conferences she attended, as they involved the same subject matter being shared with employees of other public institutions and professional organizations. (R at 9). Because Jones’ speech involved issues of public concern, *Pickering* balancing should be applied to determine whether the speech is constitutionally protected.

### Conclusion

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals and hold that WSU Medical’s Policy is a violation of the Equal Protection Clause of the Fourteenth Amendment, and that Jones’ speech is protected under the First Amendment, pending *Pickering* balancing.

Respectfully Submitted,  
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